The Central Law Journal.

ST. LOUIS, NOVEMBER 4, 1887.

CURRENT EVENTS.

TRUSTS — CORPORATIONS — MONOPOLY. — In our article on trusts in the last issue of the JOURNAL,[1] we postponed to a future number the further consideration of the subjects of "trusts."

In that article we endeavored to show that all unincorporated "trust" companies were simply partnerships, and all persons interested in them, either originally or by subsequent purchase of certificates, were partners and liable as such, provided their returns were contingent upon the success of the enterprise, or, in other words, provided they shared the profits. We think that these propositions cannot be successfully controverted if the trust is the result of merely individual organizations.

When, however, the trust is initiated or controlled by corporations, a different question is presented, and that question is, whether the powers which the corporations assume to exercise is conferred upon it by their charters or by general corporation law, and whether such exercise is contrary to public policy, or otherwise in contravention of law. If their action conforms to these standards all is well, otherwise they subject themselves to all the penalties and forfeitures that can be inflicted under a writ in the nature of a *quo warranto*, successfully prosecuted. Of course, therefore, the validity of the action of a corporation in entering into or forming a trust must, in a great measure, if not altogether, depend upon the terms of its charter, and by those terms it must stand or fall. Some corporations are strictly circumscribed, others seem to have a charter, "wide as the winds," to do pretty much as they please, so that it is obvious that whenever the creation and operation of trusts, under the auspices of corporations, shall be brought to the test of judicial scrutiny, many interesting questions of corporation law must be discussed and decided.

We have already said that the public, general or professional, has very scant information as to the *modus operandi* of these companies. We understand, however, that the process is this: two, three or more corporations (or companies) engaged in a particular line of trade, agree to form a trust; the trust is organized, trustees and officers agreed upon or elected by the constituent companies, the purposes and limitations of the trust settled in a trust deed executed presumably by, or for the companies, trust certificates are issued and sold, and their proceeds constitute the working capital of the trust, and the certificates themselves, except such portions of them as are retained by the companies, become material for speculation in the stock exchanges.

When the matter shall be brought before the courts, three questions we think will be presented. First, what is the *status* of the outside holders of trust certificates; second, whether the action of the constituent corporations is *ultra vires* and void, and what must be the consequence if it is; and, third, whether the formation of trust companies for the purposes for which they are usually formed is not against public policy or otherwise illegal.

We do not presume of course to answer these questions, but merely state our first impressions. We think that if the trust company is incorporated *as trust company*, the holders of the certificates are stockholders, if it is not, they are partners; we think, further, that the question whether the constituent corporations in organizing a trust act *ultra vires*, and what penalties and forfeitures they incur thereby, depends wholly upon the terms of their respective charters. As to the third question we have something more to say.

The object of these trust companies, as generally understood, is two-fold, to enlarge the operations of the constituent companies, and by combination to suppress competition and increase profits; and, secondly, to bring in fresh money to aid in accomplishing that purpose. It is manifest that these companies have an undoubted right to get and use in their lawful business all the money they can honestly come by, but whether they can lawfully use it to suppress competition and create a monopoly is more questionable.

We must confess that it seems to us that this word "monopoly," as generally used in these days of unfeltered trade, is a mere "word of terror to frighten fools withal." It

[1] 25 Cent. L. J. 385.

is generally applied *ad odium*, indeed "odious monopoly" is the term applied to many successful enterprises by those who are outside and would like to be inside, but cannot get in.

We all know, of course, the origin of the term, and the cause of its unsavory reputation. A sovereign granted to some person, usually a court favorite, the exclusive right to sell some particular commodity, and nobody else could sell it at any price, high or low. Of course, the profits of the favorite were enormous, and the people were grievously oppressed by his exactions. His rights, however, were recognized by the law, and enforced by the courts, and we submit that it is a perversion of language to apply a term rendered odious by oppressions so gross, to the results produced by the skill, sagacity, enterprise and capital of private citizens, howsoever numerous and howsoever well organized.

There are two rules of trade which meet with universal acceptance. One is that a man has a right to buy as much of any lawful commodity which is offered for sale as he can pay for, and at the lowest price for which he can get it; and the other is that one has a right to sell anything he has, for as much as he can get for it, or as much less as he chooses. How far the courts will modify these rules against the trust companies remains to be seen, and in this connection we look forward with much interest to the decision of the case of the State of Louisiana v. The Cotton Oil Trust.

NOTES OF RECENT DECISIONS.

MORTGAGE—ADVERSE POSSESSION—TENANT AND CO-TENANT.—In a recent case,[1] the Supreme Court of New Hampshire defines with precision the relative legal position of mortgagor and mortgagee, when the latter does not enter into possession of the mortgaged premises. The facts were, that in 1857, one Eastman mortgaged to John Perkins a half interest in the premises in question, a house and land, and subsequently, in 1869, abandoned all claim to the property. Previous to that time, in 1862, Eaton, the defendant, went into possession of the premises and occupied them thereafter. He entered as tenant and by permission of S. M. D. Perkins, who owned the other half of the property. The mortgagee, John Perkins, never entered into possession of the land, and after his death his administrator, Charles Perkins, brought a real action against Eaton, to recover the half of the property so mortgaged to John Perkins by Eastman. Eaton pleaded *null disseisin* and the statute of limitations. There was a verdict for the demandant, and when the case came up on the defendant's exceptions the court said:

Upon the execution of the mortgage the seisin, as well as the time of the demanded premises, vested in the demandant's intestate, who acquired and remained in constructive possession of the same until his death, unless the defendant's occupation assumed an adverse character by some unequivocal act distinctly brought to his knowledge. After the title became vested in the mortgagee, the mortgagor's possession was that of a tenant at will or at sufferance, or analogous to it; and the mortgagee's right to recover possession first accrued when the demandant, as his legal representative, by bringing this suit, elected to treat the defendant's possession as a disseisin.[2]

The defendant, by pleading *nul disseisin*, admitted that he was in possession of the demanded premises claiming a freehold, and denied the demandant's right to recover any part of the premises.[3] Under this plea no evidence was admissible except on the question of title. The defendant claims a title acquired by adverse possession. He does not claim under Eastman, the mortgagor. He went into possession in 1862 as the tenant of S. M. D. Perkins, the owner of the other undivided half of the premises, and has since paid him rent for his half. There is no evidence tending to show that he occupied or claimed Eastman's undivided half adversely to him or to the demandant's intestate.[4] The fact that the defendant made some repairs upon the buildings while in their occupation as tenant of one of the owners, is not, stand-

[1] Perkins v. Eaton, July 15, 1887; 5 N. Eng. Rep. 59.

[2] Howard v. Hildreth, 18 N. H. 105; Sheafe v. Gerry, 18 N. H. 245; Chellis v. Stearns, 22 N. H. 312; Furbush v. Goodwin, 29 N. H. 321; Trippe v. Marcy, 39 N. H. 439; Clough v. Rowe, 1 N. H. L. ed. 140 (2 N. Eng. Rep. 254); 63 N. H. 562.

[3] Mills v. Peirce, 2 N. H. 9; Graves v. Amoskeag Mfg. Co., 44 N. H. 462.

[4] Campbell v. Campbell, 13 N. H. 483.

ing alone, evidence of an adverse holding against the owner. The defendant's possession was the possession of his landlord; and a tenant in common taking the income and making repairs is presumed to be in according to his title, unless he claims that his possession is exclusive and an ouster of his cotenant.[5]

The demandant's testimony as to the conversation with Eastman in 1869 was competent to show that his mortgage was not barred by the statute of limitations.[6]

[5] Thompson v. Gerrish, 57 N. H. 85.
[6] Hodgdon v. Shannon, 44 N. H. 572, 576.

UNPAID CORPORATE STOCK — LIABILITY.

Judge Story is credited with being the author of the statement, that the capital stock of a corporation is a trust fund for the benefit of its creditors.[1] This doctrine has been universally adopted in this country.[2]

As a consequence of this proposition, a corporation is not authorized to dispose of its stock at any sum under its par value.[3] Much ingenuity has been exercised in the attempt to evade this doctrine. Stock has been declared by the corporation to be fully paid up, when in fact only a partial payment has been made thereon. It has been sold for property on a valuation far beyond its worth. It has been issued as a dividend on the increased value of the assets of the corporation, when there has been no permanent increase thereof. All such evasions the courts declare to be void.

Overvaluation of Property.—Though corporations have sometimes been forbidden to issue stock for property, yet now it is generally held they can do so, even when the laws of incorporation are silent on the subject.[4] Overvaluation must be shown to have been intentional and fraudulent.[5] A mere error of judgment is not sufficient. In all cases of overvaluation the contract must be adopted or rescinded *in toto*.[6]

Who can Complain.—The sovereign, the corporation, the stockholder and the creditors, are all aggrieved by such evasions of the law, but their rights and remedies, owing to their different relations, are different.[7]

Remedy of the State.—The State can dissolve the corporation for its breach of duty.

Remedy of the Corporation.—Such acts being *ultra vires* the corporation can sue to annul them, but if the corporation has ratified them, or if its directors were the authors of the act and refuse to sue, a stockholders may sue for the benefit of the corporation.[8] In this case the whole contract is set aside.[9]

Remedy of Stockholder.—The injury is to the corporation, and the stockholder is only allowed to sue because the officers refuse to do their duty, and the results of the litigation inure to the corporation, consequently the rights are the same as when the corporation sues. It makes no difference, that the plaintiff became a stockholder in order to bring the suit, or that he is instigated by others.[10]

Remedy of Creditor.—The creditor can compel the stockholder to complete the payment for his stock.[11]

English Rule.—The English courts have never adopted Judge Story's proposition. They hold, that the creditor is bound by the contract whenever the corporation is, consequently such contract must be impeached for fraud and rescinded *in toto*.[12] Since contracts for the purchase of stock are registered with the public registrar, it is held that a corporation may legally dispose of its stock at any terms agreed on.[13]

[1] Wood v. Dummer, 3 Mason, 308.
[2] Sawyer v. Hoag, 17 Wall. 610; Curran v. State, 15 How. 304.
[3] Upton v. Tribilcock, 91 U. S. 45; Wetherbee v. Baker, 35 N. J. Eq. 501; Crawford v. Rohrer, 59 Md. 599.
[4] Wetherbee v. Baker, *supra*.
[5] Lake Sup. Iron Co. v. Drexel, 90 N. Y. 87; Carr v. La Fevre, 27 Pa. St. 413; Douglass v. Ireland, 73 N. Y. 100.
[6] Kent v. Quicksilver M. Co., 78 N. Y. 159; Sheldon H. B. Co. v. Eickemeyer H. B. Co., 90 N. Y. 607.
[7] People v. Phœnix Bank, 24 Wend. 431; State v. Standard Life Assn., 38 Ohio St. 281; Com. v. Commercial Bank, 28 Pa. St. 383.
[8] Kent v. Quicksilver M. Co., 78 N. Y. 159; Cogswell v. Bull, 39 Cal. 320; Hersey v. Veasie, 24 Me. 9.
[9] Carling's Case, L. R. 1 Ch. Div. 115; Gilman, etc. R. R. v. Kelley, 77 Ill. 426; Phelan v. Hazard, 5 Dill. 45.
[10] Coleman v. East Co. R. Co., 10 Beavan, 1; Ramsey v. Gould, 57 Barb. 398.
[11] Sagory v. Dubois, 3 Sand. Ch. 466; Scovill v. Thayer, 105 U. S. 143.
[12] Dronfield Silkstone Coal Co., L. R. 17 Ch. Div. 76; *In re* Ince Hall R. M. Co., L. R. 23 Ch. Div. 545*n*; Anderson's Case, L. R. 7 Ch. Div. 75; Currie's Case, 3 De G., J. & S. 367.
[13] *In re* Ince Hall R. M. Co., *supra*.

Liability of Officers.—Officers of a corporation are always liable for the damages sustained by their neglect of duty or by their breach of trust.[14] Where the officers have authorized the issue of stock as fully paid, when in reality it is not, what are the proper damages to be recovered against them may be considered to be still a mooted question.[15]

Vendor and Vendee.—An innocent vendee can always sue those who, knowingly, sold him stock as fully paid up, when in reality it was not such, or on account of any purchase induced by misrepresentation, for the damage he has sustained thereby.[16]

What Stockholders are Liable.—One who subscribes for stock at the original formation of the company in the manner authorized by statute, so that the corporation is bound to receive him, becomes thereby at once a stockholder with the liabilities attached to the position.[17] But an agreement to subscribe, or to take, or purchase shares, made after the organization, or not under the statute, is an agreement to buy the shares as saleable securities, and the purchaser does not become a stockholder, till he has accepted the stock.[18] After the stock is transferred, the original holder is discharged from subsequent liability, unless the charter otherwise provides.[19] A *bona fide* purchaser of stock declared to be fully paid up is not liable, though in reality the stock is not fully paid up.[20] Such a purchaser is one who buys stock, the certificate whereof states that it is fully paid,[21] but a statement that it is non-assessable is not sufficient.[22] So he is protected when the books of the company show that the stock is fully paid.[23] In other cases a transferee is liable.[24] It has been properly maintained, though other courts have not yet adopted that conclusion, that certificates of stock, which are daily transferred from one to another, should be held to represent fully paid stock, in the absence of statements to the contrary thereon.[25] It is generally held that a corporation cannot take its shares by release or cancelation till they are fully paid up.[26] Where they are so received back, a re-issue is a sale which may be made at any price.[27]

Exceptional Rulings.—It has been held, that one who receives stock direct from the company, which he purchases at a discount from one to whom it was originally allotted by the company, is not liable for the unpaid balance.[28] So where stock only partially paid and also some of its bonds were issued by a corporation to its stockholders as a gratuity, because they had been called on to pay more than was expected at first, it was held, that there was no liability incurred. In this case it was held, that there was no statute or contract making them liable.[29] In an earlier case, against another stockholder relative to the same transaction, the Missouri courts [the corporation was chartered in Missouri] held, that the stockholders were liable for the amount unpaid on the stock and for the amount realized on the bonds.[30]

It has been held, that the company could transfer its unsold stock at its market value in payment for services rendered, when the stockholders knew of and consented to such action.[31]

Waiver of Right by Creditor.—A creditor may in his contract waive all right of action against stockholders by express provision.[32] So he has no right of action if he knew when he made his contract, that the stock, though issued as such, had not been fully

[14] Bank v. Hill, 56 Maine, 385; Schultz v. Christman, 6 Mo. Ap. 338.

[15] Carling's Case, L. R. 1 Ch. Div. 115.

[16] McAleer v. McMurray, 58 Pa. St. 126; Barnes v. Brown, 80 N. Y. 527; Flagler E. M. Co. v. Flagler, 19 Fed. Rep. 468.

[17] Carlisle v. Saginaw V. R. R., 27 Mich. 315; Quick v. Lemon, 105 Ill. 578.

[18] St. Paul R. R. v. Robbins, 23 Minn. 440; Lathrop v. Kneeland, 46 Barb. 432; Clark v. Continental I. Co., 57 Ind. 138; Weiss v. Mauch Chunk I. Co., 58 Pa. St. 295.

[19] Isham v. Buckingham, 49 N. Y. 216; Chouteau S. Co. v. Harris, 20 Mo. 382; Allen v. Montgomery R. R., 11 Ala. 437.

[20] Young v. Erie Iron Co., S. C. Mich. 31 N. W. Rep. 814.

[21] Steacy v. Little Rock R. R., 5 Dill. 348; Young v. Erie Iron Co., *supra*.

[22] Upton v. Tribilcock, 91 U. S. 45.

[23] Erskine v. Lowenstein, 11 Mo. App. 595.

[24] Upton v. Tribilcock, *supra*.

[25] Keystone Bridge Co. v. McCheney, 8 Mo. App. 496; Johnson v. Sullivan, 15 Mo. App. 55.

[26] Abeles v. Cochran, 22 Kan. 405; Currier v. Lebanon S. Co., 56 N. H. 262; Johnson v. Bush, 3 Barb. Ch. 207.

[27] Assumed in Otter v. Brevoort Petro. Co., 50 Barb. 247.

[28] Young v. Erie Iron Co., *supra*.

[29] Christensen v. Eno, N. Y. Ct. App. 12 N. E. Rep. 648.

[30] Shrainka v. Allen, 76 Mo. 384; S. C., 7 Mo. App. 434.

[31] Van Cott v. Van Blount, 82 N. Y. 535.

[32] Basshor v. Forbes, 36 Md. 154; Robinson v. Bid

paid up.[33] It has even been held, that he is bound to ascertain the facts and is concluded thereby.[34] Where it was customary to issue stock in mining companies as fully paid up, upon payment of a small percentage of the par value, it was held, that creditors were bound by the custom and could only look to the property of the company for payment of their accounts. The reasoning of the court in this case was partly based on the fact, that the directors could by law always assess the stock to carry on operations, and the provision in the law that a stockholder might always be discharged upon payment of his proportion of the debts of the company.[35]

Waiver of Right by Stockholder.—A stockholder must act promptly in such matters, lest the rights of third parties may intervene. By his laches he will lose his right to any remedy.[36] So a stockholder who consented to the action has no remedy, nor has his transferee.[37]

Venue of Proceedings.—Such suits may be instituted against the defendants wherever they may be found,[38] but if the remedy is restricted to a mode of proceeding, which is only provided for in such state (the state of incorporation), the suit cannot be brought elsewhere.[39] Many of the statutes are plainly penal, and are therefore not enforced elsewhere, such as penalties on the officers for not making proper returns,[40] but many statutes which make the officers liable for the debts of the corporation for neglect of duty to trend very near to penal statutes, and still have been enforced in other States.[41]

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well, 22 Cal. 379; French v. Teschemaker, 24 Cal. 518; Brown v. Eastern S. Co., 134 Mass. 590.

[33] Coit v. N. Car. G. & Amal. Co., 15 Phila. 496; Young v. Erie Iron Co., *supra*.

[34] Peck v. Coalfield Coal Co., 11 Bradw. 88.

[35] *Re* South Mountain M. Co., 7 Sawy. 30; s. c., 8 Sawy. 366.

[36] Kent v. Quicksilver M. Co., 78 N. Y. 159; Hoyt v. Quicksilver M. Co., 17 Hun, 169; Taylor v. South R. R., 4 Woods 575; Ashhurst's Appeal, 60 Penn. St. 290.

[37] Ffooks v. S. W. R. Co., 1 Sin. & G. 142; *Re* Syracuse R. R., 91 N. Y. 1; Kent v. Quicksilver M. Co., *supra*.

[38] Flash v. Conn., 109 U. S. 371; Paine v. Stewart, 33 Conn. 517.

[39] Taft v. Ward, 106 Mass. 518.

[40] Derrickson v. Smith, 27 N. J. L. 166; Veeder v. Baker, 83 N. Y. 156.

[41] Neal v. Moultrie, 12 Ga. 104.

MASTER AND SERVANT—MACHINERY AND APPLIANCES—EMPLOYEE'S VIOLATION OF RULE.

PENNSYLVANIA CO. V. WHITCOMB, ADMR.

Supreme Court of Indiana, June 14, 1887.

1. *Master and Servant—Machinery and Appliances.*—The law requires the master to provide suitable machinery and appliances for the use of his servants.

2. *Same—Delegation of Duty.*—And this duty of the master cannot be delegated so as to relieve him from responsibility.

3. *Same—Violation of Rule by Servant.*—It is within the province of a railroad company to require their brakemen to couple cars by the use of a coupling stick; and where such a rule exists, known to a brakeman, it is regarded as a part if his contract of service, and where such brakeman is injured by attempting to make a coupling by hand he is precluded from recovering, in the absence of a showing by him that such coupling could not have safely and practically been made with the coupling stick.

ELLIOTT, J., delivered the opinion of the court:

Millard Spurlin was in the service of the appellant as a brakeman and was killed, while engaged in the line of his duty, in coupling cars. The complaint of the appellee, who sues as the administrator of Spurlin, alleges, among other things, that "the defendant carelessly, negligently, and contrary to its duty, had in its use and control on said railway at Lewis Creek station, Shelby county, Indiana, two freight cars which were unsafe and unsuitable in their construction, in the manner following, to-wit: That through the heavy beam across one of said cars there projected a large iron rod for the distance of, to-wit, four inches beyond said beam, and about, to-wit, two feet from the draw-bar on said beam, and that on the other of said cars there projected a large cast-iron stirrup or post socket for the distance of, to-wit, six inches from the heavy beam across the end of said car; the stirrup or socket being bolted to said beam about, to-wit, two feet from the draw-bar thereon, and that said cars were so unsafely and insecurely constructed, that, when they were being coupled together, the said iron bolt and iron stirrup or socket were almost opposite each other, and with no more of space between them than, to-wit, three inches. And the plaintiff says that, in order to couple said cars together, it was necessary for the brakeman performing said duty to go between said car in which was said iron bolt and the other car, and insert the link and bolt at their proper places in the draw-bars; he necessarily standing, at the time, at such distance from the dead-woods aforesaid as to be between said bolt and said stirrup or socket on the other car. And the plaintiff says that on the day and at said station, while the freight train on which the said decedent was employed was engaged in switching and moving and shifting freight cars, the said decedent, in the

performance of his duty, went between the two cars above described to couple them together, one of said cars standing still, while the other was being pushed along the track by the engine toward the first named car, the decedent necessarily standing, at the time, at such a distance from the dead-woods aforesaid as to be between said bolt and the said stirrup or socket on the other car; that, while so standing there engaged in coupling said cars together, the said cars were pushed together by said engine, and the decedent was caught between said bolt and said stirrup or socket, and his body was so crushed, pressed, and injured thereby that he died in said county in fifteen minutes thereafter, as the result of said injuries occasioned as aforesaid; and that if said cars had been safely, suitably, and properly constructed, said injuries and death would not have occurred. The plaintiff also says that said injuries were received without any fault or negligence on the part of said decedent."

The appellant answered in several paragraphs, but we regard the controlling question the same upon all of these paragraphs; for the sufficiency of all of them depends upon what is alleged to be a contract entered into between appellant and the appellee's intestate. That contract is averred to be evidenced by a circular issued by the appellant, and assented to by the intestate. Omitting immaterial and formal parts, the circular and the alleged agreement of the decedent read as follows:

"Coupling cars by hand is dangerous and unnecessary. This work can be as effectually done by the use of a coupling stick, which will be supplied to employees by yard-masters at Louisville, Jeffersonville, Columbus, Madison, and Indianapolis. From this date the company will not assume any liability or pay any expenses incurred by employees on account of injures received in coupling cars.

E. W. McKenna, Superintendent.

"I hereby acknowledge the receipt of a copy of the above circular. "M. Spurlin."

It is averred in the answer that during all the time that Spurlin was in the appellant's service a full supply of coupling sticks was kept with the yard-masters at Louisville, Jeffersonville, Columbus, Madison, and Indianapolis, "and that the said Millard Spurlin, although he might and could readily have supplied himself with one of the said coupling sticks at any one of said places, or from the caboose of said train, where there was a supply, and of which he had knowledge, failed to do so, and attempted to and made said coupling, whereby he was injured as complained of, by hand. It is denied that decedent was in any manner obligated, or that it was his duty, to make said coupling other than by the use of a coupling stick, and it is averred that, had he used one of said coupling sticks, it would not have been necessary for him to go or stand between said bolt and stirrup or socket."

It is undoubtedly the duty of the employer to provide the employee with a safe working place, and with safe machinery and appliances. The employer is not bound to exercise the highest degree of skill and care in discharging this duty, but he is required to exercise ordinary care and skill. Kruger v. Louisville, etc., Co., 11 N. E. Rep. 957, (May 17, 1887); Bradbury v. Goodwin, 108 Ind. 286, 9 N. E. Rep. 302; Pittsburgh, etc. Co. v. Adams, 105 Ind. 151, 5 N. E. Rep. 187; Baltimore, etc. Co. v. Rowan, 104 Ind. 88; 3 N. E. Rep. 627; Indiana Car Co. v. Parker, 100 Ind. 181, and cases cited. This duty is one which the law enjoins upon the master, and it is one which cannot be so delegated as to relieve him from responsibility. The agent to whom it is intrusted, whatever his rank may be, acts as the master in discharging it. He is in the master's place. Kruger v. Louisville, etc. Co., *supra*, and cases cited; Indiana Car Co. v. Parker, *supra*, and cases cited; Northern Pac. R. Co. v. Herbert, 6 Sup. Ct. Rep. 590, 33 Alb. Law J. 288. In the case last cited the authorities are reviewed, and the court said: "This duty he cannot delegate to servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability."

These principles, so confidently relied upon by the appellee, by no means solve the questions presented by these answers. Duties rest upon the employee as well as upon the employer. Obligations are imposed upon the one by law, as well as upon the other. One of these obligations imposed upon those who enter another's employment is that he shall assume the risks and dangers incident to that employment which are known to him, or which by the exercise of reasonable care he might have known. No one is bound to remain in a service which he is informed is dangerous; and if an employee does voluntarily continue in the master's service after notice of its dangers, he assumes all risks arising from the known dangers. Umback v. Lake Shore, etc. R. Co., 83 Ind. 191; Louisville, etc. Co. v. Orr, 84 Ind. 50; Bradbury v. Goodwin, *supra;* Lake Shore, etc. Co. v. Stupak, 8 N. E. Rep. 630; Indiana, etc. Co. v. Dailey, 10 N. E. Rep. 631, (this term); Hatt v. Nay, 10 N. E. Rep. 807. The risks which the employee assumes are, however, such as are incident to his service, and such as arise in cases where ordinarily safe machinery and appliances are provided. If machinery of an unusual and more dangerous character is provided, and the employee has no notice of the danger, then he does not assume the risk attendant upon its use. Baltimore, etc. Co. v. Rowan, *supra*. If the deceased continued in the master's service after the danger of coupling cars was made known to him as incidental to his service, he voluntarily assumed the risk, and it is very doubtful whether the complaint is good. This we say because it does not aver that the cars were not ordinary ones, and the danger from coupling them an unusual

one. But, as no assault is made upon the complaint, we do not pass upon its sufficiently. It is necessary, however, to speak of the character of the complaint, for the question is whether the answer is good to the complaint as drawn, and not whether it would be good in any case. It is difficult, we may further add, to perceive how this action can be maintained without showing that the danger was not incident to the service, or the cars of an unusual kind; but on this phase of the subject we express no direct opinion.

The circular warns the employees that the coupling of all cars by hand is dangerous. Its warning is not confined to cars of a particular class, but it extends to all kinds and all classes. Nor is it simply a warning notice. It is much more. It is a warning and a direction. It instructs all employees to couple all cars with a coupling stick, and forbids the coupling by hand. This is its legal meaning and effect. By clear and necessary implication, it forbids the coupling of cars by hand, and commands that it be always done by the instruments provided for that purpose. We very much doubt whether an employee who remains in service after such a warning, and who disobeys the instructions received from his employer can recover without at least affirmatively showing that obedience would have caused greater damage than disobedience, or that obedience was not practicable under the circumstances of the particular case. Buzzell v. Laconia, etc. Co., 48 Me. 113; Frazier v. Railroad Co., 38 Pa. St. 104; Mad River R. Co. v. Barber, 5 Ohio St. 541; Senior v. Ward, 1 El. & El. 385. It is difficult to conceive any principle upon which an employer can be held liable to an employee who disobeys instructions without cause or excuse. Analogous cases seem to declare against the right of recovery; for, to mention one of many, even a passenger who violates, without excuse, the rules of a carrier, cannot maintain an action. We are strongly inclined to the opinion that, where there is a disobedience of instructions, there can be no recovery by the employee unless he shows that obedience would have augmented the danger, or that it would have been impracticable. But we need not decide this question, for the answers carry us beyond it. While it is not necessary to decide the questions we have just adverted to, it is nevertheless proper to speak of them, since what we have said is logically connected with what follows upon the ruling question in the case.

We regard the circular, and the acts performed under it, as constituting it a contract. By formally acknowledging the receipt of the circular, and continuing in the service of the company, the decedent made its terms part of the contract with his employer. It was in the nature of a statement to him of the terms upon which the company would continue him in its service. It asserts, if not in express terms, by clear implication, that cars must not be coupled by hand; that they must be coupled by the use of the appliances provided, and that, if they are coupled by hand, the company will not be liable for injuries received by its employees. These are the terms of the contract of hiring. There are many cases in the books holding that the rules adopted by the employer, and made known to the employee, enter into and form part of the contract. Payne v. Western, etc. R. Co., 13 Lea, 507, 49 Am. Rep. 666; Carew v. Rutherford, 106 Mass. 1, 14; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Collins v. New England Iron Co., 115 Mass. 23; Bradley v. Salmon Falls, etc. Co., 30 N. H. 487. It is, indeed, not simply the right of the employer to adopt proper rules, but it is his duty to do so. Abel v. President, etc., 9 N. E. Rep. 325; Vose v. Lancashire R. Co., 2 Hurl. & N. 728; Haynes v. East Tenn. R. Co., 3 Cold. 222. Even in the case of a passenger, the rule is that the regulations of the carrier enter, to some extent at least, into the contract of the parties. Chicago, etc. Co. v. Bills, 104 Ind. 13, 3 N. E. Rep. 611; W. U. Tel. Co. v. Harding, 103 Ind. 505, 511, 3 N. E. Rep. 172; Ohio, etc. Co. v. Applewhite, 52 Ind. 540; Pittsburgh, etc. Co. v. Nuzum, 50 Ind. 141, 19 Am. Rep. 703. It is obvious that a business requiring the employment of many persons could not be properly conducted without a system of rules, and it is equally clear that the rules would be of little force unless they formed a part of the contract between the employer and employee. If they did not constitute an element of the contract, they would protect neither the master nor the servant; and unless the master may prescribe rules, and exact obedience to them, he cannot control his own business. It seems quite clear on principle that the employer may adopt reasonable rules, and that, when brought to the knowledge of the employee, they constitute an element of the contract. The decided cases recognize this general rule, although there seems to be some difference in the course pursued in giving it practical effect. Ford v. Fitchburg, etc. Co., 110 Mass. 240; Sprong v. Boston & A. R. Co., 58 N. Y. 56; Memphis, etc. Co. v. Thomas, 51 Miss. 637; Louisville, etc. Co. v. Frawley, 9 N. E. Rep. 594.

Where a person enters the service of another, knowing the rules prescribed by his employer, he impliedly undertakes to obey these rules, and this undertaking enters into his contract. An undertaking implied by law is as much a part of the contract as its express stipulations. Long v. Straus, 107 Ind. 104, 6 N. E. Rep. 123, and 7 N. E. Rep. 763. It needs but little argument to prove that one who enters a service governed by rules which are known to him contracts to perform service under those rules. It is evident that this must be so, or else the cases which hold that it is a breach of duty on the part of the master not to make rules, as well as those which hold that it is a breach of duty for the employee to violate them, are not well decided; and that they are not correctly decided cannot be granted, so that the conclusion must be that the rules form an element of the contract of service. If regulations are not part of the contract, then they create no duty on

the part of the master, and impose no obligations on the employee. If there is no duty, there is no liability; and yet, as we have seen, the cases all agree that there is a liability while there is a breach of known rules. It cannot be possible that a servant may discharge his duties as he sees fit, regardless of the rules prescribed by the master. To affirm that he can, would be to strip the master of all authority over his own business, and leave him powerless to instruct or command. If the master has authority, and gives it expression in rules duly made known to his employees, they, by accepting service, agree, as part of their contract, that they will obey these rules. If this be not so, then there can be no systematic government of the master's business, nor any definite rule for determining the rights and duties of the parties, where the relation of master and servant exists. There is some conflict in the authorities upon the question whether a contract exonerating the employer from liability for negligence is valid. Roesner v. Hermann, 8 Fed. Rep. 782; Western R. Co. v. Bishop, 50 Ga. 465. But we do not enter this field of conflict. It is not necessary for us to do so, because we need go no further than determine that a master may lawfully contract that his employees shall use certain designated appliances in performing the duties of their services.

Our decision is that the contract before us is a valid one, so far as it affects the case made by the complaint; for we regard it as an undertaking that the employees shall use a designated appliance. It is not, so far as concerns the question now before us, a contract that the employer shall not in any event be liable, but it is an agreement that the employer will not be liable unless the appliances provided by him are used as he directs. The contract applies to the coupling of all cars, and the employee agrees to use the coupling stick in all cases. The employer had the right, therefore, to assume that the employee would not undertake to couple cars, no matter what their kind or class, without making use of the coupling stick. If a coupling could have been safely made with a coupling stick, then there is no liability, whatever may have been the kind of cars the employee was required to connect. The employer was not bound to do more than to provide such cars as might have been safely connected by the use of the appliance which the employee was directed to use. There can be no liability, at least until it is made to appear that, had the coupling stick been used, still the duty of coupling could not have been safely performed, or that, under the circumstances, it was not practicable to use the appliance selected by the employer.

The presumption is that the master has performed his duty. Hard v. Railroad Co., 32 Vt. 473; Wood, Mast. & Serv. 708; 3 Wood, Ry. Law, 1468. This presumption the employee must overcome; for it stands, until overthrown, as a *prima facie* case. Nave v. Flack, 90 Ind. 205. It must, therefore, be held that the appellant discharged its duty unless the contrary has been affirmatively shown, and this leads to the conclusion that the presumption is, in the absence of countervailing facts, that the appellant did provide such cars as might have been safely coupled by the use of the coupling stick. It was incumbent on the appellee to overthrow this presumption, for until overthrown it stands in his way to a recovery. Where the contract requires that the employee shall use appliances designated by the master, and he fails to do so, the master cannot be deemed in fault unless something more is made to appear. Nor can the master be deemed in fault for providing cars that cannot be safely coupled by hand, when he has required his employees not to couple by hand in any case, but to use the coupling stick in every case. Where, as here, the agreement is that the employee will couple cars in the designated manner, the master is bound to use reasonable care to provide cars that may be safely coupled in that manner, but is not bound to furnish cars that cannot be safely coupled in the manner forbidden by the contract of service. The utmost that can be conceded to the complaint in this case, if, indeed, so much can be conceded, is that it shows an actionable breach of duty in failing to provide cars that could be coupled by hand without injury to the brakemen. The complaint, conceding its sufficiency, is sufficient only because it shows a negligent breach of duty in failing to furnish cars that might be safely coupled by hand. The theory of the complaint is that it was proper to couple by hand; the appellant did not provide such cars as could be safely coupled in that manner; therefore, it is liable. The complaint makes a *prima facie* case, if it makes one at all, only upon the hypothesis that it was the appellant's duty to provide cars that might with safety be coupled by hand; and, if this hypothesis is destroyed, the *prima facie* case fails. The answer does destroy this *prima facie* case, because it shows that it was a breach of duty by the employee to undertake to couple the cars by hand, and because it shows that the obligation resting on the appellant was that of providing cars which might safely be coupled by the use of the coupling stick. The duty of the master, under the contract of service, was to provide cars that might be coupled without danger by the use of a coupling stick, and not to provide cars that might be safely coupled by hand. If this was the appellant's duty, then it is manifest that, to constitute a cause of action, there must be facts showing a breach of this duty.

We regard the answer as presenting at least a *prima facie* defense, and this is sufficient is drive the appellee to a reply. Judgment reversed.

NOTE.—The authorities are in perfect accord upon the proposition that it is the duty of the master to provide safe and suitable machinery and appliances, and keep the same properly protected and in repair at all times. For illustrations of the doctrine, consult

1 White v. Nonantum Worsted Co. (Mass.), 11 N. E

the cases cited in the notes.[1] In this respect the measure of the master's duty is reasonable care, and this necessarily has relation to the parties, the character of the business, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the circumstances under which it is exerted.[2] But, as consistent with the standard of legal duty, it is held that the master is not bound to adopt the latest improvements in the machinery and appliances. If those which he does employ are safe and suitable, the legal requirement is fulfilled.[3]

And in an Illinois case it is said that he is bound to use such machinery as is found to be *safest* when applied to use, yet he is not required to seek out and adopt new inventions.[4] So, in a recent New York case, it is held that this rule does not require that the machinery used shall be the best and latest improved of its kind, but that it shall be reasonably safe and suitable for the purpose.[5] So, the master, not being an insurer of the employee's safety, it follows that he is not bound to furnish absolutely safe machinery.[6]

It is a rule of law, equally well established, that a person, upon entering into the employ of another, assumes all risks ordinarily incident to the business. "He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for injuries resulting to him therefrom."[7] See the cases in the foot notes for numerous and instructive illustrations.[8]

In harmony with this rule, it has been held that an employee of mature years and ordinary intelligence, who has been warned of the danger of coupling cars, takes upon himself the manifest risk of coupling a buffer engine with a car, the source of danger being as apparent to the employee as to the employer.[9]

It is within the province of the railroad company to make reasonable rules for the regulation and conduct of its employees. And when so made and notice of them is given to an employee, they become a part of the contract of service. "Whether the rule be reasonable involves the question of power to make it, and must, therefore, be determined by the court; but whether it is adequate for the safety of others and the management of trains, is a question for the jury."[10] And where the rule is violated the burden of proof is upon the employee to establish that its violation by him did not contribute to the injury.[11]

It follows that if such violation has no connection with the injury, it is no defense; as where an engineer violated the rule of the company by permitting another engineer to ride upon the engine with him.[12]

So, the fact that plaintiff was injured while disobeying a rule of defendant railroad company that a stick must be used in coupling cars, does not prevent him from recovering in such an action, when it appears that the injury actually suffered would have been received even if the stick had been used in making the coupling.[13]

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Rep. 75; Rice v. King Phillips Mills (Mass.), 11 N. E. Rep. 101; Rogers v. Ludlow Mfg. Co. (Mass.), 11 N. E. Rep. 77; Robinson v. Blake Mfg. Co. (Mass.), 10 N. E. Rep. 314; Feltham v. England, L. J. 372, B. 14; 7 B. & S. 676; Weems v. Mathieson, 4 McQueen (S. C.), 245; Indianapolis, etc. R. Co. v. Flanigan, 77 Ill. 365; Chapman v. Erie R. Co., 55 N. Y. 579; Toledo, etc. R. Co. v. Ingraham, 77 Ill. 309; Mad River, etc. R. Co. v. Barber, 5 Ohio St. 564; Davis v. Detroit, etc. R. Co., 20 Mich. 105; s. c., 4 Am. Rep. 364; Devitt v. Pacific R. Co., 50 Mo. 302; Rorer on Railroads, 834, 835, 1197; Needham v. Louisville, etc. R. Co. (Ky), 3 S. W. Rep. 797.

2 Wood's Master and Servant (2d ed.), 685; *Id.*, p. 706; Penn., etc. R. Co. v. Ogier, 35 Pa. St. 60; Cayzer v. Taylor, 10 Gray, 274; Ryan v. Fowler, 24 N. Y. 410; Siela v. H. & St. Joe R. Co., 82 Mo. 430; Covey v. H. & St. Joe R. Co., 86 Mo. 635; Porter v. H. & St. Joe R. Co., 71 Mo. 66; Lewis v. St. L., I. M. & S. R. Co., 59 Mo. 495; Hall v. Mo. Pac. R. Co., 74 Mo. 298; Muirhead v. H. & St. Joe R. Co., 19 Mo. App. 634.

3 Stack v. Patterson, 6 Phil. (Pa.) 225; Philadelphia, etc. R. Co. v. McKenan, 103 Pa. St. 124; Fort Wayne, etc. R. Co. v. Gildersleeve, 33 Mich. 133; Botsford v. Michigan Cent. R. Co., 33 Mich. 256; Lake Shore, etc. R. Co. v. McCormick, 74 Ind. 440; Pittsburg, etc. R. Co. v. Stentmeyer, 92 Pa. St. 276; Ladd v. New Bedford, etc. R. Co., 119 Mass. 412; Cogney v. Hannibal, etc. R. Co., 69 Mo. 416.

4 Toledo, etc. R. Co. v. Asbury, 84 Ill. 429.

5 Hickey v. Taffe (N. Y.), 12 N. E. Rep. 486.

6 Siela v. H. & St. Joe R. Co., 86 Mo. 430; Covey v. H. & St. Joe R. Co., 86 Mo. 635; Hickman v. Mo. Pac. R. Co., 22 Mo. App. 344.

7 Wood's Master and Servant (2d ed.), 672.

8 Arkeson v. Dennison, 117 Mass. 412; Renfro v. Chicago, etc. R. Co., 86 Mo. 302; Knapp v. Sioux City, etc. R. Co. (Iowa), 32 N. W. Rep. 18; Scott v. Oregon, etc. R. Co. (Oreg.), 13 Pac. Rep. 98; Louisville, etc. R. Co. v. Frawley (Ind.), 9 N. E. Rep. 594; s. c., 28 Am. & Eng. Ry. as. 308.

9 Wormell v. Maine Cent. R. Co. (Me.), 10 Atl. Rep. 9; s. c., 25 Cent. L. J. 372. See Darracutts v Chesapeake, etc. R. Co. (Va.), 2 S. E. Rep. 511.

10 2 Rorer on Railroads, 838. See 1 *Id.* 227; Chicago, etc. R. Co. v. McLallen, 84 Ill. 109; 16 Am. Ry. Rep. 425; Crocker v. New London, etc. R. Co. 24 Conn. 249; Cleveland, etc. R. Co. v. Bartram, 11 Ohio St. 457; Hibbard v. New York, etc. R. Co., 15 N. Y. 455; Stephen v. Smith, 29 Vt. 160; Southern R. Co. v. Kendrick, 40 Miss. 374; Com. v. Powers, 7 Met. 596; Pittsburg, etc. R. Co. v. McClurg, 56 Pa. St. 294; Tracy v. New York, etc. R. Co., 9 Bosw. (N. Y.) 396; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420.

11 Rorer on Railroads, 838.

12 Central R. Co. v. Mitchell, 63 Ga. 173; s. c., 1 Am. & Eng. Ry. Cas. 145.

13 Reed v. B., C. R. & N. R. Co. (Iowa), 33 N. W. Rep. 451.

LOST INSTRUMENTS — PRINCIPAL AND SURETY—BOND—ACTION—PLEADING.

DOLLARHIDE V. PARKS.

Supreme Court of Missouri, June 6, 1887.

1. *Lost Instruments.*—Where a sheriff's deed, duly acknowledged, but not recorded, has been lost while in custody of the court as evidence in a cause, the evidence of the grantee and of the sheriff as to its contents and execution, and of the record of the court as to its acknowledgment in open court by the sheriff, is sufficient to authorize the issuance of an amended deed in conformity with the evidence.

2. *Surety—Co-surety.*—Where the property of a surety on a bond which has not been attached is sold before that of a co-surety, which has been attached, there is no cause of complaint, if the whole amount realized is sufficient to satisfy the judgment. The irregularity should have been seasonably called to the attention of the court.

3. *Bond — Official Bond — Collateral Attack.*—Where an action is brought by the State upon the relation of a county upon the official bond of an officer of that county against the sureties on such bond, the

judgment in such an action is not liable to collateral attack on the ground that the county had never authorized the action to be brought.

RAY, J., delivered the opinion of the court:

This is an action of ejectment for the recovery of the described premises, the petition being in the usual form. The defendant, Marion Parks, was the original defendant in the cause against whom the suit was instituted, and the other defendants, Theophilus Parks and Amos Smith, were upon their own motion made parties defendant. The answer of the defendants was as follows: "And now come the defendants in this cause, and for answer to plaintiff's petition filed in said cause deny each and every allegation contained in said petition. And, further answering, say that on the sixteenth day of May, 1877, the lands in question were sold by W. D. Harryman, sheriff of Hickory county, Missouri, under an execution in a cause wherein the State of Missouri, at the relation and to the use of Hickory county, was plaintiff, and John D. Pitts, William A. Pitts, Y. M. Pitts, A. J. Pitts, M. W. Dorman, William Dollarhide, John W. Quigg, Joseph Crates, and John Jackson were defendants, as the lands of William Dollarhide, to Amos S. Smith; that at time of said sale of said lands William Dollarhide was the owner thereof; that a deed was executed to Amos S. Smith by said W. D. Harryman, as such sheriff, conveying the interest of said William Dollarhide, of, in, and to said lands; that said William Dollarhide was present at said sale, and afterwards said William Dollarhide received a credit therefor upon the judgment named in above-mentioned cause; that said lands were afterwards sold by said Amos S. Smith to Theophilus Parks, and afterwards said Theophilus Parks sold said lands to Marion Parks, defendant in this cause; and, having fully answered, said defendants pray to be discharged, with costs."

The plaintiff filed a replication, which is as follows: "Now comes plaintiff, and for reply to defendants' answer admits that the sheriff, W. D. Harryman, made a deed to the lands in petition mentioned, to Amos S. Smith, and pretended to convey the interest of William Dollarhide thereto. Plaintiff alleges that said deed is void, and did not convey the legal or any equitable title to said premises. He denies each and every other allegation in said answer."

In 1874 one John D. Pitts was elected to the office of collector of the State and county revenue for the county of Hickory, in this State, and this plaintiff, with others, it seems, went upon his bond as such collector. Upon a settlement of the accounts of said collector with the county court of said county, a large sum found due and owing the different revenue funds of the county, unaccounted for by the collector, and, in a suit upon the bond by the county, judgment was recovered in the sum of over $3,600. Under said judgment, the land in question, then belonging to plaintiff Dollarhide, was, with a large lot of other lands belonging to the obligors in said bond, sold at sheriff's sale, and said Smith became the purchaser, and received the sheriff's deed therefor, dated May 26, 1877, mentioned in the pleadings aforesaid. Afterwards said Smith conveyed to said Theophilus Parks, and said Theophilus to said Marion Parks, said last two deeds, being of warranty, and formal in all respects. The said sheriff's deed to Smith, when offered in evidence at the trial, was successfully objected to by plaintiff, upon the ground that it was void upon its face, for the reason that it recited a judgment rendered on the fifteenth day of November, 1877, and a sale on the sixteenth day of December, 1877, when there was no court in session. In order to have been correct, said recitals in the deed should have been that said judgment was rendered on November 15, 1876, and that said sale was made on the sixteenth day of May, 1877. In other words, the misrecital as to the judgment is in the year, the year 1877 being given, whereas the correct year was 1876, and the misrecital as to the sale is in the month, December being used instead of May. The deed further recites that execution dated the eighteenth of December, 1876, was issued on said judgment, directed to said sheriff. and delivered to him, by virtue of which, on the first day of January, 1877, he made the levy, and that on the sixteenth day of December, (May,) 1877, "and during the session of the circuit court at the May term thereof, A. D. 1877," the right, title, and interest of said William Dollardide was exposed to sale, etc. The deed bears date May 18, 1877; was acknowledged in open court on the twenty-sixth day of May, 1877. With the exception of the misrecitals aforesaid, the deed was otherwise formal and correct, as is conceded.

We deem it unnecessary to discuss or consider at length the several and opposing views of counsel, as to whether said misrecitals were such as made the deed void on its face, or are to be regarded as clerical mistakes, for the reason that the amended deed of said Harryman, duly executed, acknowledged, and delivered to said Smith for the said lands, was entirely free from these infirmities which were corrected in the amended deed made for that purpose, and that its subsequent loss or destruction did not lose or destroy its force and effect.

Defendant Smith testified, without objection, that in November, 1879, upon trial of a certain suit in ejectment, wherein one George Smith was plaintiff and said William Dollarhide was defendant, and involving some of the lands embraced in said sheriff's deed, the latter, when offered in evidence, was objected to, upon the ground that it recited that the sale was made on the sixteenth day of December, 1877, instead of the sixteenth day of May, 1877; and that thereupon he had the sheriff, who executed the same, brought in, who then produced his sale-book, which contained the entries of sales made to said Smith by him, and referred to in said deed, which sale-book showed the sale was made on said May 16, 1877; that h

had made particular inquiries for said sale-book, and learned that it was lost, having been informed it was destroyed when the court-house was burned; that at the trial, at said November term, 1879, at his request, the court directed the sheriff to make him an amended deed, and that said sheriff and witness took said sale-book, and said execution in the original suit of State, to the Use of Hickory Co. v. Pitts *et al.*, upon the collector's bond, and the deed offered in evidence, and filled up a simular printed form; and that an amended deed, with the same recitals, was then made out, correcting said misrecitals as to the dates of the judgment and sale, which the sheriff signed and acknowledged in open court, and which, after the indorsement of acknowledgment by the clerk, was delivered to him; that he then offered the amended deed in evidence in said cause of said Smith v. Dollarhide, then pending before Fyan, the judge of said court, who left without deciding the case, taking said deed with him. He further testified that Judge Fyan informed him the deed was destoyed or lost in the cyclone at Marshfield, Missouri, in April, 1880.

The evidence of the sheriff was to the effect that at said November term, 1879, he made such amended deed, for the purpose of correcting the misrecitals in the former deed; that the amended deed recited that the judgment was rendered in 1876, and that the sale was made in May instead of December; that he and Smith compared the amended deed with the original, and the sale-book and execution, Smith reading the amended deed while he read the former deed, execution, and sale-book; that he acknowledged the deed in open court, and delivered it. In this behalf defendant also offered in evidence the records of the circuit court of date November 14, 1879, in said action upon the collector's bond, containing the entry of acknowledgment of said sheriff of a deed by him to said Smith, and conveying the same lands embraced in the original deed offered in evidence, including the land involved in this action.

This evidence, and there is no evidence to the contrary in the record, clearly shows the execution, the loss or destruction, and contents of said amended deed. The objection urged in this behalf is that the evidence of the witness Smith shows that it was filed for record; that the law presumes it was recorded; and that the record, therefore, was the best evidence of its contents. But the evidence of Smith, we think, fully and satisfactorily answer the objection in this behalf. He testifies as follows: "Harryman took that deed, and in my company went into the court-house, and, after having before signed it, ac-acknowledged it in open court. The clerk indorsed the acknowledgment upon the deed, and afterwards handed it to me. I had it filed for record. M. N. Neihart, the recorder, said he had not time to record it at that time. The filing was indorsed by him upon the deed. I then offered that deed in evidence in the cause of Geo. A. Smith v. Wm. Dollarhide, then pending in court. Judge Fyan left without deciding the case. He took the deed with him. I have used every possible effort to find the deed. It is lost. I am informed that it was lost or destroyed in the cyclone at Marshfield, Mo., in April, 1880."

2. The plaintiff, in rebuttal, offered and read in evidence the petition in said suit on the bond of the collector, for the purpose of showing that the same was fatally defective, for want of sufficient statement of facts, to constitute a cause of action, and that for this reason no judgment could be rendered therein in said cause. The plaintiff contends in this behalf that the right of the plaintiff in that suit to sue on said bond was a necessary and indispensable allegation, and that the petition therein nowhere alleged that Hickory county authorized the bringing of the suit by the State, nor showed the facts from which such right and authority could be inferred. The cause is entitled in the petition, "State of Missouri, to the Use and in Relation of Hickory County, Plaintiff, against John D. Pitts, * * * Wm. Dollarhide and others," who are named, defendants. It charges that in November, 1874, the defendants, by their certain writing obligatory, sealed with their seals, became bound to the State of Missouri, in the amount of the bond; that said Pitts had been duly elected and commissioned to the office of collector of the State and county revenue of the county of Hickory and State of Missouri, and had entered upon and was performing the duties of said office; that the condition of the bond, being void, was that he should collect and pay over the State and county revenues, and perform the duties of his office as such collector according to law. It charges that as collector of the revenue of Hickory county, in January, 1876, he made his settlement with the county court of said county, and that at the date of said settlement with the county court of Hickory county, the given sum was found in his hands as such collector due and owing the different revenue funds of the county, which are specially set out, and he is charged with appropriating to his own use, and refusing to pay over, these several sums belonging to the revenue funds of the county. This certainly is a statement of a cause of action, so far as the misappropriated revenue of the county is concerned, to collect which is the sole object of the suit, and shows that the county was the real party in interest, for whose use and benefit the cause was prosecuted in the name of the State. The cases to which we have been referred, of which State v. Matson, 38 Mo. 489, is one, are not, we think, applicable. The State is a mere nominal party, and the county does not sue in any representative capacity, but in its own right. The county is the real party in interest, and the proper and necessary party to recover the lost revenue funds belonging to the county for which the bond is given as security, as well as to secure the State revenue. State v. Patton, 42 Mo. 530. But even if the petition failed to state a cause of action yet being

amendable, the judgment thereon is not a nullity; nor can its validity, or the rights of purchasers thereunder, be attacked in a collateral proceeding like this.

A further question in the case remains to be disposed of. After the institution of the suit on the collector's bond, attachments in aid thereof were taken out against the lands of the collector, and the lands of five of the sureties on the bond, and certain tax receipts in the hands of one of the Pitts, a surety on the bond, was also attached as the property of the collector; but no attachment was sued out or levied upon the lands or property of this plaintiff, Dollarhide, or of Quigg, another surety on said bond. The return of the sheriff shows a sale of the lands of Dollarhide (the plaintiff), of Quigg, and William Pitts, on the 16th day of May. Of the lands so sold on the 16th, those belonging to Dollarhide and Quigg, as we have seen, had not been attached, while those belonging to said William Pitts had been. The lands belonging to the collector, and those belonging to the other sureties on the bond, had been attached, and, as the returns show, were sold on May 17th, or the day after.

The point made is that under the judgment and execution the attached property must be first sold, and that the sale of sheriff's land on the 16th was unauthorized and void. All the land which had been attached, except such as was exempt, was in fact sold. The whole amount realized upon the sales of all the lands was $1,324.50, of which sum $218 was retained as costs, and a credit entered for $1,105. The judgment entered in November, 1876, was, in round numbers, for $3,652, and the interest or penalties added to the time of sale in May, 1877, had greatly increased the total amount. After the sale, therefore, of all the property levied on, including that which had been attached, there was still a large balance due on said execution or judgment. The judgment was special in this, that it declared the bond of the collector sued on a perpetual lien on the real estate of the collector, as provided in the statute, and sustained the attachment as to the collector and other specified sureties in the bond; but the judgment was also general, and authorized a levy upon property of all the defendants sufficient to satisfy the execution, whether the same was attached or not. The execution recites the names of the parties, the date and amount of the judgment, and the court in which it was rendered. It then recites the lien declared on the lands of the collector under the bond, and the attachment liens against him and the five sureties, and then adds: "These are, therefore, to command you that of the said described real estate and personal property, and if the same be not sufficient, then of any other of the goods and chattels, lands, and tenements of the said defendants, John D. Pitts, William A. Pitts, Y. M. Pitts, D. B. Pitts, A. J. Pitts, Michael W. Dorman, William Dollarhide, John W. Quigg, Joseph Crates, and John Jackson, you cause to be made the debt, accruing interest, and costs, aforesaid, and that you have the same before the judge of our said court on the second Monday in May, A. D. 1877, next, to satisfy said debt, interests, and costs, and have you then and there this writ, certifying how you have executed the same."

So far as the sureties were concerned, they were all alike and equally responsible for the deficits of the collector under the bond, and the decree establishing the attachment lien against the property of some of them, and a general judgment against all of them, did not give them, as among themselves, any right to direct the officer as to which property should be first sold. As between the sureties and the collector and principal in the bond, the rule may be otherwise, even under a judgment like this one; but, at most, they could, by proper showing to the court in that behalf, compel the release of the levy, or set aside the sale, only after showing that the property of the principal was sufficient and available for the satisfaction of the writ. In this case the entire property sold brought less than one-third the amount called for by the writ.

The sale of plaintiff's lands on the 16th, before the sale of a portion of the attached land on the 17th, if an irregularity at all, was one to which the court's attention should have been seasonably called. It appears that Dollarhide was present at the sale of the land to Smith, which was made on the 16th day of May, and the deed acknowledged on the 26th of May. Court was in session for the period of ten days, during which plaintiff did nothing, by motion or otherwise, to modify, control, or set aside the sale, but permitted the same to be consummated, and the deed made, and under these circumstances we think he cannot be heard in that behalf in a collateral proceeding of this sort. It also appears that thereafter said Dollarhide, with the other sureties, appeared before the county court, and effected a compromise of the judgment on the collector's bond. They claimed and received a credit for the amounts realized from the sales of their lands under the execution, and settled and compromised the balance of the principal of the judgment at fifty cents on the dollar, the court knocking off the penalties. While the application of the proceeds of a sale under execution is a matter over which the debtor in the execution generally has no control, under the above facts plaintiff, with the other sureties, by the compromise aforesaid, satisfied and discharged the whole judgment against them, and by their said acts in that behalf not only plainly and manifestly assented, but actively desired and procured, application of the proceeds of the execution sale in that way. They have thereby ratified the sale. From all which it is perfectly manifest that the execution, contents, and loss of the sheriff's amended deed, correcting the misrecitals in the original, was fully and satisfactorily established by the evidence in the cause; and that the same was valid and competent to transfer, and did transfer, plaintiff's title

unless some of the other objections urged by plaintiff are well taken, and these also, as we have seen, have no merit in them.

It is manifest, therefore, that plaintiff, under all the evidence in the cause, is not the owner of the land, and has no standing in court, and for these reasons the judgment of the circuit court is reversed, in which all concur.

WASTE—COMMON LAW WASTE—TRANSFER OF TITLE AND POSSESSION—TRESPASS.

LANDER V. HALL.

Supreme Court of Wisconsin, September 20, 1887.

1. *Waste—At Common Law and by Statute—Trespasser.*—Neither at common law nor by the statute law of Wisconsin (Rev. Stat. Wis. § 3177), can an action for waste be maintained against a mere trespasser, a stranger to the title and the possession.

2. *Tax-title — Certificate.* — Under the statute of Wisconsin (Rev. Stat. Wis. § 3177), the holder of a certificate of tax-title may, pending the period of redemption, maintain an action for waste, but only for *technical* common law waste; he cannot sustain such an action against a mere trespasser.

3. *Pleading—Trespasser—Demurrer.* —A complaint by the holder of a tax-title charging that defendant broke into the lot in question, and removed fences and houses charging these acts as "waste," and not charging any connection of defendant with the title or right of possession of the premises, charges only a simple trespass and is bad on demurrer.

COLE, C. J., delivered the opinion of the court:

The plaintiff moved to strike out the demurrer as frivolous, which the court denied, with $10 costs of motion. We must consider the appeal from this order as equivalent to an appeal from an order sustaining the demurrer. For the rule has been settled, in a number of decisions, that an appeal from an order striking out a demurrer as frivolous would be treated the same as an appeal from an order overruling the demurrer. Consequently, to be consistent in the practice, this must be treated as an appeal from an order sustaining the demurrer to the complaint. Counsel for the plaintiff says the order must in any event be reversed, because of the refusal of the court to allow him to amend the complaint. The record fails to show any such refusal, or that leave to amend was asked for. True, the order says nothing about leave to amend, but we cannot assume from that that leave was asked and refused. Doubtless the court would have granted the plaintiff leave to amend, had he asked that favor. But a party ought not to be permitted to object for the first time in this court to an order which is silent as to amendment, when it does not appear that an amendment was asked and refused. The court will give $10 costs under section 2924.

We will now consider the complaint itself, as though the demurrer to it had been sustained. The complaint states, substantially, that the plaintiff, at the tax-sales of 1883, 1884, and 1885, purchased a lot in the city of Fort Howard, upon which there was a dwelling-house; that in May, 1886, he obtained a tax-deed upon the tax-certificate issued upon the sale of 1883; that in August, 1885, the defendants unlawfully and tortiously broke and entered upon the lot, and removed the fences and dwelling-house thereon, and committed other acts of waste, which greatly impaired the value of the premises. Judgment is demanded that the defendants be restrained from committing further waste upon the premises, and that the plaintiff have judgment for $500. It will be observed that only one wrongful act is complained of, which was committed by parties who were strangers to the title, and had no right of possession. It was a naked trespass, and the parties guilty of the tort were merely trespassers. The question, therefore, raised by the complaint, is, can a tax-title claimant maintain an action for waste, or one in the nature of waste, for a simple trespass committed before his tax-deed was issued, by one in no way related to the title or possession? Waste is commonly defined to be a permanent injury to land by a tenant or one holding an intermediate estate. 1 Washb. Real Prop. § 4 (5th ed.); 2 Burrill, Law. Dict. "Waste" (2d ed.); Bac. Abr. "Of Waste" (10th ed.). The person committing or held liable for the injury was a tenant of some kind. If a stranger committed waste, an action of waste lay against the lessee in favor of him who had the next immediate estate, in reversion or remainder, because the lessee had his remedy against the stranger for the trespass. Bac. Abr., *supra*. The relation of tenancy was what distinguished the wrongful act from trespass to the realty. Consequently, waste was applicable only to persons having a limited interest or estate in lands, as tenant for life or for years, or *per autre vie*, as tenant in dower, or tenant by the curtesy. 1 Washb. Real Prop., *supra*.

The plaintiff, however, does not claim that he could have this action of waste without the aid of chapter 136, Rev. Stat. 1878. He says that the action is brought under the provisions of that chapter, where no privity of estate, as between the parties, need exist, as at common law. An examination of that chapter will show that this view is not correct. Sections 3171, 3172, 3173, 3174, and 3175 are applicable only to cases where some privity of estate or tenancy exists between the parties. This is obvious. A "restriction existed at common law in respect to estates in possession of tenants in dower and curtesy, because, as these were created by the law itself, it was thought that the law was bound to protect the reversioner or remainderman from being thereby injured. But where the estate of the tenant was created by act of the parties, it was held that, if the grantor or lessor failed to protect the estate by stipulations in his deed or lease, the law was not bound to supply the omission." 1 Washb. Real Prop., *supra*. It is quite probable that it

was to remedy this and other defects in the law that the above sections were enacted. Be this as it may, it is apparent that these provisions go upon the theory or assumption that a privity of estate or tenancy of some kind exists. It is plain that they have no reference to a mere trespass to the realty, committed by a stranger to the title. But the counsel claims that the action is given in express terms by section 3177. That section provides that "the purchaser, or his assigns, holding any certificate of sale of real estate, duly issued upon any sale for taxes, or upon execution, or by virtue of a power of sale in a mortgage, may have an action to restrain the commission of waste during the period of redemption, and if no redemption shall be made, and a deed shall be issued pursuant to such certificate, the grantee, or his assigns, may in such action, or by a subsequent action, recover damages against any person for any waste committed by such person on the premises after such sale." If in this section the word "waste" is a synonym for the word "trespass," the contention of the counsel would be well founded. But we think the word is used in this statute in its strict technical sense, and signifies an act which amounted to waste at common law, where a privity of estate existed. We have seen that such relation must exist, and that this distinguished waste from trespass to the realty. We do not think the legislature intended to give, or has given, the holder of a tax-certificate the action of waste against a stranger who commits a trespass. It is said the tax-title claimant needs this remedy against any one in order to protect his security, without regard to the fact of a privity of estate. But this argument is one which should be addressed to the legislature, and not to the courts. The question here is, has the legislature given the action of waste for a mere trespass committed upon real estate before a tax-deed issued? Considering all the sections of the statute, we are of the opinion that it has not. If the legislature had intended to make so great a change in the law as to give the tax-title claimant an action in the nature of waste for a mere trespass, it would have said so in clear and explicit language. This view of the statute is strengthened by the language of the next section, which describes acts which shall not be deemed waste. It enacts that "any person entitled to the possession of lands, sold as mentioned in the preceding section," may enjoy it and do certain things upon it, until the expiration of the time for redemption, without being liable to an action for waste therefor. This implies that the legislature had in mind persons having some rights to the property injured. The counsel says the exception of persons lawfully entitled to the possession from liability for certain acts, was equivalent to declaring that a mere trespasser would be liable in this form of action to the tax-title claimant for doing the same things. But we infer that the object was to exempt from liability for waste persons who were embraced in the statute, and who would otherwise be liable under the old English rule. We do not think it warrants the conclusion that the legislature had already provided that a person who was a stranger to the title and possession was liable in an action of waste for trespass.

Counsel also relies upon a remark in Lacy v. Johnson, 58 Wis. 414, 17 N. W. Rep. 246, to support his view. In that case a very different question was presented from the one we have here. The defendant there had entered upon lands for the purpose of cutting and removing the growing timber thereon, under contract with the plaintiff, which gave him right so to do. After having cut and removed the timber, he attempted to resist the payment of the contract price, on the ground that he had obtained a tax-deed on the lands after the timber had been cut and removed. It was held that the tax-deed to the defendant, taken as it was, did not in any way affect the plaintiff's title to the timber which was cut, removed, and sold before it was issued. Mr. Justice Taylor says: "If the taking of a tax-deed by a stranger would have subjected the defendant to an action of waste for cutting and removing the logs, it is very clear that, when the tax-deed was issued to the defendant himself, he could not maintain an action against the plaintiff for the waste which he had himself committed under the authority of the plaintiff, nor could he, or any third party taking such a tax-deed, maintain any action to recover such possession of the logs cut and sold after the tax-sale, and before the tax-deed was in fact issued, under the provisions of section 3177, Rev. Stat. The remedy given by that section is purely statutory, so far at least as tax-claimants are concerned, and the only remedy given is an action of waste to recover damages." The question whether there must be some privity of estate between the plaintiff and defendant, in order to maintain an action of waste, was not in the case; therefore was not as carefully considered as it would have been had it been involved. The learned justice's attention was directed solely to the merits of the defense, and the remark was incidentally made that the tax-claimant was given an action of waste to recover damages, etc. But this cannot bind our judgment in this case as to the proper construction of the statute.

Our view is that the demurrer to the complaint should have been sustained. The order is therefore affirmed.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACTION — Partnership — Mortgage — Judgment — Priority.——Where two of several mining partners mortgaged their interest in the mining property, and afterwards the partnership was sued and only these two were served, it was held that the mortgage was a prior lien on the property. In this case the mortgagees after foreclosure sued in ejectment the defendants, who had bought the property under their judgment, and it was held that the defendants could not avail themselves of the rule as to the priority of firm creditors in an action at law when that equitable right was not set up.—*Golden S. & M. L. W. v. Davidson*, S. C. Cal., Sept. 15, 1887; 15 Pac. Rep. 20.

2. ADMIRALTY—Reopening Decree—Costs — Release—Bond.—— A decree in admiralty may be reopened at the same term on motion and at a subsequent term on petition. The sureties in a release bond may be adjudged to pay the costs, though a separate stipulation for costs may have been filed.—*The Madgie*, U. S. D. C. (Ala.), March 22, 1887; 31 Fed. Rep. 926.

3. AMENDMENT—Mistake—Appeal— Record.——Where, in the recital of an order for a peremptory *mandamus* a mistake is made, and an appeal has been taken, the record and papers still remaining in the trial court, that court may amend the order and correct the mistake, as it does not lose jurisdiction by the mere granting of the appeal.—*State ex rel. v. Town Board of Delafield*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 123.

4. APPEAL—Bill of Exceptions — Signing. —— When the bill of exceptions is signed after the statutory time, it will be presumed that the reasons for so doing were sufficient.—*People v. Raschke*, S. C. Cal., Sept. 14, 1887; 15 Pac. Rep. 13.

5. APPEAL—Dismissal.——If, upon appeal, the supreme court renders a judgment that there are no errors in the record and by mandate orders the trial court to proceed to judgment, a second appeal will be dismissed, if it appears that it brings up no question which might not have been considered on the first appeal.—*State v. Miller*, S. C. N. Car., April 18, 1887; 3 S. E. Rep. 234.

6. APPEAL—Errors—Co-defendant. —— An appellant cannot urge errors which affect only his co-defendants, who have not appealed.—*Ball v. Nichols*, S. C. Cal., Aug. 16, 1887; 14 Pac. Rep. 831.

7. APPEAL—Objections—Record.——Objections to the legality of the jury will not be considered on appeal when the record fails to show the irregularities.—*Bostwick v. Mahoney*, S. C. Cal., Aug. 27, 1887; 14 Pac. Rep. 832.

8. APPEAL—Record.——Where the record does not show that an appeal has been taken the case will be dismissed, though the appellee has appeared and has not raised the question.—*Plumber v. People's Nat. Bank*, S. C. Iowa, June 10, 1887; 33 N. W. Rep. 150.

9. APPEAL—Record—Dismissal.—— Where an appeal, after a hearing upon a report of boundary commissioners, shows that objections to the report were filed and also certain affidavits, but the record does not show the contents of the affidavits nor the ruling on the objections, nor whether the report was confirmed, the appeal must be dismissed.—*Tague v. Benner*, S. C. Iowa, June 11, 1887; 33 N. W. Rep. 156.

10. APPEAL—Record—Evidence. —— Where the evidence relied on for a new trial does not appear in the transcript, and the statements as to its filing by the parties are in conflict, the presumption is that the court's ruling was correct.—*Wagner v. Condron*, S. C. Iowa, June 13, 1887; 33 N. W. Rep. 159.

11. APPEAL—Record—Interlineation.——A case cannot be tried anew on appeal when the certificate of the trial judge does not state that the transcript contains all the evidence offered on the trial, though an interlineation made by him after the time for perfecting the appeal so states, and the time of making such interlineation may be shown by other evidence than the record.—*Lewis v. Markel*, S. C. Iowa, June 11, 1887; 33 N. W. Rep. 158.

12. APPEAL—Weight of Testimony.——When the evidence is conflicting the case will not be reversed on the finding of any essential fact, unless such finding is shown to be clearly erroneous and against the weight of evidence.—*McDonough v. Smith*, S. C. Utah, Sept. 2, 1887; 15 Pac. Rep. 3.

13. ASSIGNMENT—Avoiding Transfers—Leases—Chattel Mortgages—Recording.——An assignee for the benefit of creditors may avoid transfers where creditors can avoid them. A lease reserving a lien on the goods placed on the premises comes under the chattel mortgage act relative to being recorded.—*Merrill v. Kessler*, S. C. Minn., June 13, 1887; 33 N. W. Rep. 117.

14. ATTACHMENT—Traverse—Verification.—— An affidavit for an attachment stated that defendant is about to assign his property to defraud his creditors. By special answer defendant traversed the affidavit, denying the truth of its allegations: *Held*, that it was a sufficient verification of his answer for him to swear that he has read the answer, and that "the same is true," without adding "of his own knowledge."—*Braunsdorff v. Felmer*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 121.

15. BAILMENT—Gratuitous — Rights. —— A bailee of property, gratuitously loaned to him, may sue another who has converted or negligently lost it, though he may not be responsible therefor to the owner.—*Chamberlain v. West*, S. C. Minn., June 1, 1887; 33 N. W. Rep. 114.

16. BANKS—Attachment—Jurisdiction — Process.—— If a national bank brings an attachment suit in a State court, it is liable to an action on its attachment bond in a State court. And if the process is served on its

surety, such service is, under the Georgia law, sufficient service on the bank.—*Continental, etc. Bank v. Folsom*, S. C. Ga., May 4, 1887; 3 S. E. Rep. 269.

17. BASTARDY — Action. —— An action will not lie against the putative father of a bastard child at the instance of one who has expended money for its support. The remedy is provided by statute.—*Nixon v. Perry*, S. C. Ga., Feb. 1, 1887; 3 S. E. Rep. 523.

18. BASTARDY—Bond for Appearance.——A bond in bastardy proceedings given before a justice is a recognizance, and is discharged by an appearance and surrender of the defendant.—*Sowders v. State*, S. C. Kan., Sept. 9, 1887; 14 Pac. Rep. 865,

19. BASTARDY—Jail Liberties—Statutes. —— In Wisconsin, proceedings in bastardy do not constitute a civil action, so as to entitle the person under arrest in such a case to the benefit of jail liberties under the statute of that State, Rev. Stat. Wis. § 4322.—*Hodgson v. Nickell*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 118.

20. BILLS AND NOTES—Assignment—Garnishment.—— A promise to obtain and deliver to A, in payment of a debt, a note deposited with a bank as collateral, made without knowledge of the bank, is not such an assignment to A as will prevail against another creditor who has garnished the bank for the surplus after satisfying the debt to it.—*First Nat. Bank v. Van Brocklin*, S. C. Iowa, June 10, 1887; 33 N. W. Rep. 151.

21. BILLS AND NOTES—Parol Evidence.——In a suit on a promissory note, testimony that the money was given as an advancement by the payee to the wife of the maker is inadmissible.—*Geith v. Engler*, S. C. Iowa, June 8, 1887; 33 N. W. Rep. 131.

22. BILL OF LADING—Delivery—Liability.——Where a shipper sends a bill of lading for goods shipped to another party, the common carrier, in the absence of other information, may deliver the goods to such holder of the bill of lading.—*Weyland v. Atchison, etc. R. Co.*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 133.

23. BOUNDARY — Adverse Possession. —— Where a party owns half of a section of land, and has built a fence, as he supposed, on the boundary line of his land, and had held possession inside of such fence for twenty years, but making no claim to any land not included in his deed, it was held, in a suit against him for a slip of land within his fence, alleged to be part of the adjoining half section, that a nonsuit was improperly ordered, and that the plaintiff had a right to go to the jury on the questions raised by the evidence in the case.—*Hacker v. Horlemus*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 125.

24. BRIDGES — Towns — Petitions.—— A petition for building a bridge between adjoining towns need not request that the question of borrowing money therefor be submitted to the town meeting, but the supervisor may include that question in his call if he deem it advisable. —*Insley v. Shepard*, U. S. C. C. (Ill.), July 28, 1887; 31 Fed. Rep. 869.

25. CONTRACT—Aged Parent.——Where an aged parent transfers the control of his property and a half interest therein to his daughter and her husband, for the consideration of suitably providing for his wants, he is bound by the contract as long as they perform it on their part.—*Hagerty v. White*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 92.

26. CONTRACT—Completion.——An order for cars by a shipper, not accepted by the carrier, is binding on neither party.—*Missouri, etc. R. Co. v. Texas, etc. R. Co.*, U. S. C. C. (La.), May 28, 1887; 31 Fed. Rep. 864.

27. CONTRACT—Construction—Evidence.——Where a contract is perfectly clear in its terms, parol evidence of prior conversations between the parties as to their understanding is admissible.—*Bryan v. Idaho, etc. Co.*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 859.

28. CONTRACT —Rescission—Recovery.——Where, by a sale of personal property, the purchaser having made a payment of two-thirds of the purchase money and agreed with the seller to pay the balance upon a named day, or earlier at his option, may rescind the contract if the seller refuses to deliver the property sold upon his offer to pay such balance, at a day before the day named, and in such case may recover back the money he has paid.—*Dakota, etc. v. Price*, S. C. Neb., Sept. 21, 1887; 34 N. W. Rep. 97.

29. CORPORATE STOCK—Pledge.——So long as one holds corporate stock as a pledge for a debt, and has a right so to do, he does not hold it adversely to the pledgor, nor does he against the pledgor obtain the legal title by having it issued to him.—*Cross v. Reid*, S. C. Cal., Aug. 31, 1887; 14 Pac. Rep. 885.

30. CORPORATION — Election — Pledged Stock. ——A pledge of stock of a corporation, who has it transferred to him on the books thereof till the pledgor's rights shall have been foreclosed by a sale, etc., is not entitled to vote thereon, but the pledgor is.—*State v Smith*, S. C. Oreg., April, 1887; 14 Pac. Rep. 814.

31. CORPORATIONS—Officers—Duties—Evidence.——A secretary of a corporation may testify, in a suit for his services, that he rendered duties as secretary without producing the by-laws to show that such services pertained to his office.—*Edwards v. Fargo & S. R. Co.*, S. C. Dak., 1887; 33 N. W. Rep. 100.

32. CORPORATIONS—Statute.——Construction of statute of Wisconsin, authorizing the formation of corporations and prescribing the mode of their formation—Rev. Stat. Wis. § 1772—*held*, not to apply to stock corporations.—*Edgerton, etc. Co. v. Croft*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 143.

33. COSTS—Appeal from Justice—Attorney's Fees.—— In the dismissal of an appeal from a justice, attorney's fees cannot be allowed.—*Kirkpatrick v. Dakota C. R. Co.*, S. C. Dak., 1887; 33 N. W. Rep. 103.

34. COSTS—Waiver.——At the close of defendant's testimony the court ordered a nonsuit. *Held*, that this was the end of the case, and if the defendant failed to have his costs taxed within the time prescribed by law, he waived his right to them.—*McDonough v. Milwaukee, etc. Co.*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 120.

35. COUNTY — Action — Commissioners. —— The adverse decision of the county commissioners on a claim against the county is no bar to an action thereon in in Dakota.—*Spencer v. Sully Co.*, S. C. Dak., 1887; 33 N. W. Rep. 97.

36. COUNTY BONDS—Election.——Where an election is held to authorize the issuance of county bonds to a railroad company, the law authorizing such issue of bonds must designate the company distinctly. Such bonds cannot be voted to be issued in the alternative to company A *or* company B. Such bonds must, to be valid, have upon them the certificate of the secretary of State and auditor, that they are authorized by law.—*State ex rel. v. Roggen*, S. C. Neb., Sept. 28, 1887; 34 N. W. Rep. 108.

37. COUNTY TREASURER — Embezzlement — Sureties—Action.——In the absence of proof as to time, an embezzlement by a county treasurer is presumed to have taken place at the end of his last term. The sureties on his bond may be sued jointly or severally, and the judgment should be against each for the full amount for which he made himself liable and for costs, to be satisfied by a defalcation and costs.—*Heppe v. Johnson*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 833.

38. COURTS—Jurisdiction—Replevin.——The Supreme Court of New Hampshire has jurisdiction in actions of replevin, if the value of the property in question is stated in the declarations to exceed $13.33, although in point of fact it is proved to be less than that sum.—*Adams v. Spaulding*, S. C. N. H., July 15, 1887; 10 Atl. Rep. 688.

39. CRIMINAL LAW—Alibi—Evidence.——An alibi in a trial for larceny must be established by a preponderance of evidence.—*State v. Rowland*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 137.

40. CRIMINAL LAW—Contract—Larceny. —— In California, where possession of goods is obtained under contract and with consent of the owner, but with the

felonious intent to steal at the time, such felonious taking is larceny.—*People v. Raschke*, S. C. Cal., Sept. 14, 1887; 15 Pac. Rep. 13.

41. CRIMINAL LAW—Grand Jurors—State Laws—District of California.——The district of California was continued after the creation of the southern district for the trial and punishment of all offenses committed prior to that act. The federal courts require jurors to have all the qualifications required in the State courts, and will also enforce any other objections which should disqualify them.—*United States v. Benson*, U. S. C. C. (Cal.), July 25, 1887; 31 Fed. Rep. 896.

42. CRIMINAL LAW—Indictment—Sufficiency.——It is sufficient if the indictment charges that the defendant did unlawfully, feloniously and of his malice aforethought kill the deceased, naming him, and stating the time and place.—*People v. Davis*, S. C. Cal., Sept. 10, 1887; 15 Pac. Rep. 8.

43. CRIMINAL LAW—Insanity — Moral. —— Moral insanity as distinguished from mental derangement is no excuse for crime.—*People v. Kenigan*, S. C. Cal., Aug. 25, 1887; 14 Pac. Rep. 849.

44. CRIMINAL LAW — Irrelevant Issue—Self-defense.—A person charged with manslaughter cannot be asked on cross-examination as a witness whether the wife of the deceased did not smear her hands in his blood. That is an irrelevant issue. An instruction is misleading which leaves it possible for the jury to infer that the court meant that taking a gun with him by the defendant was not merely for possible self-defense, but necessarily for the purpose of attacking the deceased. —*Radford v. Commonwealth*, Ky. Ct. App., Sept. 15, 1887; 5 S. W. Rep. 343.

45. CRIMINAL LAW—Misdemeanors—Affidavit — Information.——The offense of allowing cards to be played where liquors are sold may be prosecuted by information, filed *ex-officio* by the prosecuting attorney, without an affidavit.—*Territory v. Cutinola*, S. C. N. Mex., 1887; 14 Pac. Rep. 809.

46. CRIMINAL LAW—Stolen Goods—Value—Time.—— The information for receiving stolen goods need not allege their value. It is not material that the crime was committed three months before the time alleged in the information.—*People v. Rice*, S. C. Cal., Aug. 25, 1887; 14 Pac. Rep. 851.

47. CRIMINAL PRACTICE—Accomplice — Corroboration. ——The corroboration of an accomplice, required by California law, must tend to connect the defendant with the commission of the crime.—*People v. Clough*, S. C. Cal., Sept. 10, 1887; 15 Pac. Rep. 5.

48. CRIMINAL PRACTICE—Assault with Intent to Kill—Conviction of Assault.——Under the laws of Utah, under an indictment for an assault with intent to kill, the defendant may be convicted of an assault.—*People v. Chalmers*, S. C. Utah, Sept. 2, 1887; 15 Pac. Rep. 2.

49. CRIMINAL PRACTICE — Clerk of Court — Constitutional Law.——The law giving the clerk of the municipal court of St. Paul the power to receive the complaints and issue warrants is constitutional.—*City of St. Paul v. Umstetter*, S. C. Minn., May 13, 1887; 33 N. W. Rep. 115.

50. CRIMINAL PRACTICE—Juror.——Where, in a criminal case, one who has not been drawn as a juror, answers to the name of a juror and serves as a juror in his place, the defendant is entitled to a new trial.—*Stribling v. State*, S. C. Ga., Feb. 8, 1887; 3 S. E. Rep. 277.

51. CRIMINAL PRACTICE- New Trial.—— The accused is not entitled to a new trial on the ground that, when he testified injuriously to himself, he was suffering from a nervous headache, which affected his mind and memory, when his testimony was intelligent and coherent, and he was instructed by his counsel to plead his right to refuse to testify on such matters.—*State v. Montgomery*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 143.

52. CRIMINAL PRACTICE — Receiving Evidence out of Court.——Where, on a trial for the larceny of a cow, certain horns, about which there was nothing peculiar, were introduced in evidence as those of the stolen cow, a handling and examination of them by one of the jurors during a recess of court does not amount to receiving evidence out of court, under the California law. —*People v. Tipton*, S. C. Cal., Sept. 15, 1887; 14 Pac. Rep. 894.

53. CRIMINAL PRACTICE—Trial—Excluding Spectators. ——The exclusion of spectators generally in a criminal case, in order to preserve order and for the defendant's benefit, is not the denial of a public trial.—*People v. Kerrigan*, S. C. Cal., Aug. 25, 1887; 14 Pac. Rep. 849.

54. CRIMINAL PRACTICE—Verdict—Substance. —— On a trial for an assault with intent to commit murder, a verdict that "we, the jury in the above entitled cause, find the defendant guilty," is sufficient.—*People v. West*, S. C. Cal., Sept. 5, 1887; 14 Pac. Rep. 848.

55. CUSTOMS — Brokers—Evidence.——Where the issue is whether two brokers agreed to divide the commissions on a sale between them, evidence of a custom among brokers, that, where two make a sale, they divide the commissions, in the absence of other agreement, is not admissible.—*Smith v. Barringer*, S. C. Minn., June 13, 1887; 33 N. W. Rep. 116.

56. CUSTOMS DUTIES — Antiquities.——A proceeding to forfeit an oil painting, which could have been brought in free as an antiquity, but was not so entered, there being no intent to defraud and the officers having opportunity to examine it, must be brought within one year.—*U. S. v. One Oil Painting*, U. S. C. C. (Ill.), July 25, 1887; 31 Fed. Rep. 881.

57. CUSTOMS DUTIES—Artists' Colors.——Artists' colors in tubes, composed of ochre and umber, should be assessed under clause 89 for customs.—*Thayer v. Seeberger*, U. S. C. C. (Ill.), Aug. 1, 1887; 31 Fed. Rep. 883.

58. CUSTOMS DUTIES — Photographic Mounts. —— Photographic mounts, which have passed through a printing press and have printed thereon the name of the photographer for whom they are intended, are subject to a duty of twenty-five *per centum ad valorem*.—*Bonte v. Seeberger*, U. S. C. C. (Ill.), Aug. 1, 1887; 31 Fed. Rep. 884.

59. DESCENT — Distribution — Widow—Children.—— The law of Utah providing for distribution of the estate of an intestate with an estate worth not more than $1,000 does not give the title thereof in fee to the widow to the exclusion of minor children.—*Raudo v. Brain*, S. C. Utah, July 30, 1887; 15 Pac. Rep. 1.

60. DAMAGES—Land—Title.——In an action against a railroad for a permanent injury to the freehold of land taken by it outside of its condemned right of way, plaintiff must prove an absolute freehold title in himself.—*Watlemeyer v. Wisconsin, etc. R. Co.*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 140.

61. DEED —Description.——Where in a deed, general terms of description are used as "to" or "upon" or "along," a highway, the deed will not be construed to convey the land covered by the highway, unless the grantor was the land over which the highway passes. If courses and distances conflict with monuments set forth in a deed the latter must prevail.—*Church v. Stiles*, S. C. Vt., Oct. 6, 1887; 10 Atl. Rep. 674.

62. EJECTMENT — Adverse Possession. —— One who has conveyed land to another but continues to occupy it cannot claim to hold it adversely, he is presumed to hold in subordination to his own grantee and is estopped by his own deed from claiming otherwise. Nor can any one holding title under him claim to hold adversely to his grantee.—*Schwallenbach v. Chicago, etc. Co.*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 128.

63. EMINENT DOMAIN—Injury to land—Damages.—— Damages may be claimed for injury to land abutting on a street on which a railroad is constructed may be claimed after the laying of the track. A sheriff's jury cannot assess such damages, but only damages for land taken.—*Slough v. Chicago, etc. R. Co.*, S. C. Iowa, June 10, 1887; 33 N. W. Rep. 149.

64. EQUITY—Injunction—Dismissal Without Prejudice.

——Where an injunction suit has been submitted and actually determined in favor of the defendant, a motion to withdraw without prejudice should be refused.—*Chicago, etc. R. Co. v. Estes*, S. C. Iowa, June 8, 1887; 33 N. W. Rep. 124.

65. EQUITY — Quieting Ttitle —Void Deed.——Equity will set aside a deed regular in *formi*, but void in fact, in favor of one in possession, when the holder claims its validity but will not sue.—*Conant v. Buesing*, S. C. Fla., Sept. 19, 1887; 2 South. Rep. 882.

66. EQUITY—Rescission of Contract—Mortgage.——In an action to foreclose a mortgage on three tracts of land, given for the purchase money of two and a loan to the husband, the wife owning the third tract, the defendants cannot have the sale of one tract rescinded, when they have conveyed away the other and do not offer to pay over the proceeds thereof nor the borrowed money.—*Kelley v. Kershaw*, S. C. Utah, Sept. 2, 1887; 14 Pac. Rep. 804.

67. EXECUTORS AND ADMINISTRATORS — Heirs—Foreclosure.——When an administrator has distributed the estate under orders of the probate court, and he has delivered certain mortgage notes to the heirs, which are deemed of little value had not been brought to the attention of the probate court, the heirs can foreclose, though the administrator has not been discharged.—*Stanley v. Mather*, U. S. C. C. (Ill.), July 30, 1887; 31 Fed. Rep. 860.

68. EXECUTORS AND ADMINISTRATORS—Heirs—Contest. ——The administrator is not entitled to contest the claim of parties to heirship or to distribution.—*Roach v. Cofrey*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 840.

69. EVIDENCE—Contract—Parol Evidence.——A written contract to receive an old machine in part payment for a new cannot be varied by parol evidence, that the old machine was not to be delivered till the new one was tried and accepted.—*Davis v. Robinson*, S. C. Iowa, June 8, 1887; 33 N. W. Rep. 132.

70. EVIDENCE —Witness—Instructions.——When the maker of a note pleads *non est factum* the plaintiff cannot ask him, on cross-examination, whether he did not authorize the person who signed the note sued on, to sign other notes, nor what was the amount of a note which he gave to a third party, the object not being apparent in either case. In a civil action, the court should not charge the jury as to the sufficiency of conviction in a criminal case.—*Etheredge v. Hobbs*, S. C. Ga., Feb. 1, 1887; 3 S. E. Rep. 251.

71. FRANCHISE — Forfeiture — Corporation. —— The charter of a private corporation cannot be forfeited, nor its franchises taken away by a collateral or incidental proceedings. Its franchises can only be forfeited by a direct proceeding for that purpose by the State, which may, like an individual, waive broken conditions and forego forfeitures.—*Greenbrier, etc. Co. v. Ward*, S. C. App. W. Va., June 2, 1887; 3 S. E. Rep. 227.

72. FRANCHISE—Roads—Practice.——One who has a franchise to keep open a watering place on a "reserve," and is required to keep in good order and repair roads and bridges on and about such watering place and on the reserve, is not bound to keep up roads to the springs outside of the reserve. An application for a continuance must state that it is not made for delay.—*Lamar v. McDaniel*, S. C. Ga., May 9, 1887; 3 S. E. Rep. 409.

73. FRAUDS — Statute of — Lands—Trusts.——Where land is conveyed to A, on his agreement to sell the land and apply its proceeds to certain purposes, he receiving no benefit therefrom, such agreement must be in writing to raise such a trust.—*McGinnis v. Barton*, S. C. Iowa, June 11, 1887; 33 N. W. Rep. 152.

74. FRAUDULENT CONVEYANCE—Change of Possession. ——Where A sells personal property to B, which, by supplemental agreement, he may retake on default of payment, such agreement is void against a creditor of B, who, with knowledge of the facts, sells the property under execution against B, after B has made default and refused to surrender the property and has continued to hold it.—*McClain v. Buck*, S. C. Cal., Aug. 31, 1887; 14 Pac. Rep. 876.

75. FRAUDULENT CONVEYANCES—Husband and Wife—Limitations—Parties.——Real estate conveyed by a husband to his wife by a deed not recorded, and which he continues openly to control, may be reached to satisfy a judgment against him. The limitation against all claims against an estate not presented in ten months does not bar such action, and the administrator is not a necessary party.—*O'Doherty v. Toole*, S. C. Ariz., Sept. 25, 1887; 15 Pac. Rep. 28.

76. FRAUDULENT CONVEYANCE — Intent — Evidence—Witness—Expert.——When a conveyance is assailed as fraudulent, the intent of the parties is a question of fact for the jury under proper instructions. If a question is asked a witness, and an objection to it sustained, the party must offer to prove the fact so excluded, before he can assign the ruling as error. An expert's evidence is not to be excluded because he had not seen the property in question for a month previous to the transaction in question.—*Connelly v. Miller*, S. C. Neb., Sept. 22, 1887; 34 N. W. Rep. 76.

77. GARNISHMENT—Landlord and Tenant.——A landlord who takes his tenant's crop and agrees to pay tenant's debt, becomes a debtor to his tenant and is liable to garnishment at the suit of tenant's creditor, whose demand he has promised to satisfy.—*Martin v. Copeland*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 256.

78. INSURANCE—Fire—Action.——Under Iowa laws, a suit on a policy of fire insurance cannot be brought till ninety days after giving notice of loss, though the company has notified the assured that it will not pay and will stand a suit.—*Quinn v. Capital I. Co.*, S. C. Iowa, June 8, 1887; 33 N. W. Rep. 130.

79. INSURANCE — Misstatement — Agent —Description. ——Misstatements in an application for fire insurance are not prejudicial when the application was written by the agent of the company who was familiar with the property, and the assured was ignorant of the statements made. Where the application includes the cellar, but the policy omits it, but refers to the application for a more complete description, the cellar is insured.—*Menk v. Home Mut. I. Co.*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 837.

80. INTERSTATE COMMERCE ACT—Section 4.——Where the circumstances are dissimilar there is no prohibition under section 4 of the the interstate commerce act. In cases of doubt the construction should be in favor of the law. In similar cases relief can only be had through the commission.—*Missouri P. R. Co. v. Texas & P. R. Co.*, U. S. C. C. (La.), June 21, 1887; 31 Fed. Rep. 862.

81. JUDGMENT——Dormant—Execution— Statute.—— A judgment on which an execution was issued and levied, within seven years after its rendition, does not become dormant, within the meaning of the Georgia statute, although the levy of the execution was dismissed by the court.—*Banks v. Zellner*, S. C. Ga., Feb. 24, 1887; 3 S. E. Rep. 304.

82. JUDGMENT—Equity Practice.——Where an action is brought to enforce certain judgments for purchase money of land, and a judgment as by confession is had upon it, and a controversy has been raised as to the ownership of the proceeds of the sale ordered by such last judgment: *Held*, that the decree ordering the sale of the land should have been amended or its operation suspended.—*Ogden v. Brown*, S. C. App. Va., Sept. 15, 1887; 3 S. E. Rep. 236.

83. JUDGMENT — Federal Courts — Bankruptcy.—— Where the title to property has been adjudicated in a federal court having jurisdiction of the persons of the parties and of the subject-matter, its judgment is conclusive between the same parties in the State courts.—*Smith v. Walker*, S. C. Ga., Jan. 18, 1887; 3 S. E. Rep. 256.

84. JUDGMENT—Foreign—Action.——An action of *assumpsit* or debt on a foreign judgment, based upon a prior pecuniary obligation and for the costs thereof will lie.—*Mellin v. Horlick*, U. S. C. C. (Wis.), Aug. 15, 1887; 31 Fed. Rep. 865.

85. JUDGMENT—Lapse of Time—Federal Courts.——Actions on judgments rendered by federal courts, even by courts of the United States sitting in Wisconsin, are barred by the statute of that State (Rev. Stat. Wis., ch. 163, § 16), unless such action is brought within ten years after the rendition of the judgment.—*Waterman v. Town of Waterloo*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 137.

86. JUDGMENTS—Opening.——Though, in Iowa, courts can, in some cases, open judgments after one year from their rendition, yet the grounds therefor must be those specified in § 3154 of the code.—*McConkey v. Lamb*, S. C. Iowa, June 10, 1887; 33 N. W. Rep. 146.

87. JUDGMENT—Vendor and Vendee. —— Where one sells land, receives part of the purchase money, takes a note for the balance, assigns the note and prosecutes a suit upon it in the name of the assignee, he is concluded by the judgment rendered in such a suit, although not a party to the record.—*Lenton v. Harris*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 278.

88. JURISDICTION—National Banks — Penalty.——An action may be brought against a national bank in any court in the county in which the bank is located which has jurisdiction in similar cases between individuals. Such a court has jurisdiction of actions for penalties, under U. S. Rev. Stat. § 5198.—*First Nat. Bank, etc. v. Overman*, S. C. Neb., Sept. 28, 1887; 34 N. W. Rep. 107.

89. JUSTICE OF THE PEACE—Utah — Jurisdiction.——The statutes of Utah, giving justices of the peace jurisdiction in misdemeanors, where a fine of not over $300 or imprisonment not exceeding six months, may be imposed, are valid.—*People v. Douglass*, S. C. Utah, Sept. 2, 1887; 14 Pac. Rep. 801.

90. LEGACY — Assignment — Evidence. —— One who was executor and legatee under a will, resigned his office of executor and assigned his legacy to the person who was appointed administrator in his stead, in consideration of certain annual payments to be made to him: *Held*, that parol evidence was admissible to prove all the facts in the case, as the assignment did not relate to real estate.—*Jewett v. Dieter*, S. C. Vt., Sept. 24, 1887; 10 Atl. Rep. 672.

91. LICENSE—Pawnbroker.——The recorder of a city or village cannot impose a fine upon one convicted of engaging in the business of a pawnbroker without a license, unless there is an ordinance on the subject under which he acts in imposing the fine.—*Phillips v. City of Atlanta*, S. C. Ga., March 18, 1887; 3 S. E. Rep. 431.

92. LICENSE — Sheep Raising — Taxation. —— The county board of supervisors may impose a license on those engaged in raising, herding or grazing sheep, proportioned at a rate of $50 per thousand sheep, with a fine for not taking out a license and imprisonment for failure to pay the fine, though the property pays an *ad valorem* tax.—*Ex parte Mirande*, S. C. Cal., 1887, 14 Pac. Rep. 888.

93. LIEN—Realty — Fixtures. —— Mortgages put on machinery before it is attached or put in place, though lying on the ground, take precedence over the lien of the vendor of the real estate.—*Miller v. Wilson*, S. C. Iowa, June 8, 1887; 33 N. W. Rep. 128.

94. LIEN—Verbal Contract.——A verbal contract giving a lien upon personal property to secure an obligation, if made upon sufficient consideration, is valid between the parties and those having actual notice of such lien.—*Sparks v. Wilson*, S. C. Neb., Sept. 28, 1887; 34 N. W. Rep. 111.

95. LIMITATIONS—Decedents — Disability.——In California, where the personal representatives of a decedent are barred, so are the heirs, though they may be under disability. Where a right of action has accrued to one not under disability, who dies without bringing suit, the statute begins to run, though his heirs are under disability.—*McLeran v. Benton*, S. C. Cal., Aug. 31, 1887; 14 Pac. Rep. 879.

96. LIMITATIONS—Promises not in Writing—Railroad Aid.——Where a town voted a subsidy to a railroad, and subsequently bonds were issued therefor, which were adjudged to be illegal, the assignees of the bond in a suit for the appropriation are barred after five years.—*Ætna, etc. Co. v. Middleport*, U. S. C. C. (Ill.), July 5, 1887; 31 Fed. Rep. 874.

97. LIMITATIONS — Tax-titles — Actions.——Law of Wisconsin, 1885, ch. 133, § 1, relative to tax-titles, only applies where all the facts necessary to defeat the original owner existed when the act took effect.—*Webster v. Schwears*, S. C. Wis., June 1, 1887; 33 N. W. Rep. 105.

98. MANDAMUS—Amendment—Schools.——Where, after the refusal of a *mandamus* to require the directors of a divided school-district to meet and divide the assets, because they had met but had disagreed, an amendment, that they be required to appoint arbitrators, whereon the writ issued, is the same cause of action, though a new remedy is asked.—*Case v. Blood*, S. C. Iowa, June 10, 1887; 33 N. W. Rep. 144.

99. MARITIME LIEN—Ship's Husband—Stevedore Supplies—Seizure of Vessel.——A ship's husband has no maritime lien on the ship, nor in this circuit has a stevedore for loading and stowing her cargo. Supplies furnished a ship by order of the master in a foreign part are presumably furnished on the credit of the ship, but there is no lien, when the material man should have known that the master had no such authority. After seizure of a ship by an officer no maritime lien thereon can be created by those otherwise authorized so to do.—*The Estelan de Antunano*, U. S. C. C. (La.), June 11, 1887; 31 Fed. Rep. 920.

100. MECHANICS' LIEN—Description—Statute.——The right of mechanics and material men to a lien on land, for improvement put thereon, depends wholly on statute. Such statutes are remedies and must be literally construed. What is a sufficient description in an affidavit of property upon which improvements have been made, under the Nebraska statutes.—*White Lake, etc. Co. v. Russell*, S. C. Neb., Sept. 28, 1887; 34 N. W. Rep. 104.

101. MECHANIC'S LIEN — Notice — Statute. ——Statement of the requisites of the notice of a mechanic's lien as prescribed by the statutes of Indiana. What is a sufficient description in such a notice of the land affected by such a lien.—*White v. Staton*, S. C. Ind., Sept. 21, 1887; 13 N. E. Rep. 48.

102. MILITIA—Oath—Mandamus.——The law, requiring all the volunteer militia to take the oath, is retroactive, and, when they have not taken it, a *mandamus* will not issue to compel the county auditor to issue his certificate of the allowance by the county commissioners of an expense bill against them.—*State v. Ross*, S. C. Nev., Sept. 10, 1887; 14 Pac. Rep. 827.

103. MORTGAGE—Absolute Deed—Adverse Possession. ——When an absolute deed is given, but by agreement the grantor may sell the property at any time upon payment of the debt due the grantee, the adverse possession does not begin till the grantee denies the right of redemption.—*Warder v. Enslen*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 874.

104. MORTGAGE—Chattel Mortgage—Description.—— The description in a chattel mortgage, "two maremules and one horse mule" is not sufficiently definite as against a *bona fide* purchaser of mules from the mortgagor without actual notice.—*Stewart v. Jaques*, S. C. Ga., Jan. 25, 1887; 3 S. E. Rep. 283.

105. MORTGAGE — Evidence—Foreclosure—New Trial—Surprise.——Where the issue in a foreclosure suit is upon a plea of payment, evidence that all the money which by the contract was to have been paid in cash was paid in cash, is irrelevant. Evidence in chief cannot be given in reply unless permitted at the discretion of the court. One who sets by and permits unexpected evidence to be given against him without asking a postponment cannot, after having taken the chances of a trial, ask for a new trial on the ground of surpise.—*Stewart v. Smith*, S. C. Ind., Sept. 21, 1887; 13 N. E. Rep. 48.

106. MORTGAGE — Foreclosure — Proceeds of Sale — Junior Mortgage.——An officer making sale under a foreclosure of a mortgage is liable to a junior mortgagee, if he pays over the surplus to the mortgagor

with knowledge of the junior mortgage.—*Fuller v. Langum*, S. C. Minn., June 13, 1887; 33 N. W. Rep. 122.

107. MORTGAGE—Married Woman—Tenants by Entireties.——A mortgage of a wife's separate estate is voidable by her; and so is a mortgage of land held by husband and wife by entireties, even as to the husband, unless her conduct has created an equitable estoppel.—*McCormick, etc. Co. v. Scovill*, S. C. Ind., Sept. 27, 1887; 13 N. E. Rep. 58.

108. MORTGAGE—Prior Mortgage—Consideration.—— A mortgage was given part of the consideration of which is that the mortgagee shall pay off a prior mortgage. This he fails to do, but the person to whom he assigns the note and mortgage does pay it. The mortgagor, upon a foreclosure suit by such assignee, cannot claim a deduction, because the mortgagee had not paid off the mortgage according to his agreement.—*Blakely v. Twining*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 132.

109. MORTGAGE—Redemption.——A junior mortgagee is not entitled to redeem a prior mortgage as an assign, under Minnesota statutes.—*Cuilerier v. Brenelle*, S. C. Minn., June 13, 1887; 34 N. W. Rep. 123.

110. MORTGAGE—Residuary Devise.—— A residuary devise of lands vests in the devisee immediately upon the death of the testator, subject to the payment of debts and legacies. Such a devise conveys an estate, which may be mortgaged. Such an estate cannot be affected by claims for services rendered to the widow after the death of the testator.—*Flanders v. Greeley*, S. C. N. H., July 15, 1887; 10 Atl. Rep. 686.

111. MUNICIPAL CORPORATIONS—Negligence—Notice.—If an obstruction is placed in a highway and a person is thrown from his buggy and injured by reason thereof, the corporation having control of such highway is liable for such obstruction, if it is permitted to remain after ten or twelve hours' notice.—*Bloor v. Town of Delafield*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 115.

112. MUNICIPAL CORPORATIONS—Officers — Removal — Statute.——Under the statutes of New Hampshire, the power of municipal corporations to remove officers is commensurate with the power of appointment.—*Quinn v. City of Portsmouth*, S. C. N. H., July 15, 1887; 10 Atl. Rep. 677.

113. MUNICIPAL CORPORATIONS— Process— Statute.—— Under the charter of Watertown, Wis., actions against the town may be brought against the town by leaving a copy of the process with the mayor, but he is the only officer subject to such service, unless there is a vacancy, and then the process may be so served on the chairman of the common council.—*City of Watertown v. Robinson*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 139.

114. MUNICIPAL CORPORATIONS—Removal of Member —Certiorari.—— The fire commissioners of Brooklyn cannot remove a member of their body except upon notice, trial and conviction under the act of 1873, ch. 863, tit. 15, § 14. Ruling as to the hearing of a writ of *certiorari*, which, by the statute of New York, must be upon the writ, return and papers upon which the writ issued.—*People ex rel. v. Commrs. Brooklyn*, N. Y. Ct. App., June 7, 1887; 13 N. E. Rep. 28.

115. MUNICIPAL ORDINANCE—Real Estate—Possession —San Francisco.—— One claiming the title of San Francisco to land under the Van Ness ordinance, if evicted before the ordinance took effect, must recover possession by notice of his prior possession.—*McLeran v. Benton*, S. C. Cal., Aug. 31, 1887; 14 Pac. Rep. 879.

116. MURDER — Evidence — Manslaughter.——On a trial for murder it is competent to prove that defendant was drunk at the time of the killing. But it is not admissible to prove that he then had or had not capacity to distinguish between right and wrong or will power enough to control his actions. It is proper to instruct the jury that murder is killing with, and manslaughter is killing without deliberate malice. If there is no evidence tending to show that defendant was insane, he is not entitled to an instruction on the law relating to insanity.—*Buckhannon v. Commonwealth*, Ky. Ct. App., Sept. 29, 1887; 5 S. W. Rep. 358.

117. NATURALIZATION — Declaration. —— The United States circuit court clerk is not authorized to take the records of the court to a private residence to take from an alien a declaration of his intention to become a citizen.—*In re Langtry*, U. S. C. C. (Cal.), July 10, 1887; 31 Fed. Rep. 879.

118. NEGLIGENCE—Contributory—Streets. —— Where a foot passenger steps off of the sidewalk for no reason, and is hurt, when there is light enough for her to see those passing her, she is guilty of contributory negligence, and cannot recover.—*Alline v. City of LeMars*, S. C. Iowa, June 13, 1887; 33 N. W. Rep. 160.

119. OFFICERS — Civil Service — Constitutional Law—Statute.——Persons who served in the army or navy of the United States during the war of the rebellion are not entitled to hold civil office in Massachusetts, unless they have conformed to the rules of the civil service commission of that State. Ruling as to the submission by the executive or legislative branches of the government of legal questions to the supreme judicial court.—*Opinion of Justices, etc.*, S. J. C. Mass., Sept. 22, 1887; 13 N. E. Rep. 15.

120. OFFICE—Eligibility—Constitution. —— One holding a lucrative office under the United States cannot hold any State office in California.—*People v. Leonard*, S. C. Cal., Aug. 26, 1887; 14 Pac. Rep. 853.

121. PARTNERSHIP—Real Estate—Firm Property.—— Real estate purchased by partners and deeded to them in their individual names, paid for out of the firm's money, assessed to the firm and used in their business, is firm property.—*Roberts v. Eldred*, S. C. Cal. Sept. 15, 1887; 15 Pac. Rep. 16.

122. PATENTS—Celluloid—Infringement.——Patent of February 5, 1878, to John W. Hyatt, for treating celluloid are valid, and the defendants by using an iron perforated with holes, with screw threads, with flanges of zylonite, have infringed them, and also by reversing the application of the heat thereon.—*Celluloid, etc. Co. v. American, etc. Co.*, U. S. C. C. (Mass.), Sept. 7, 1887; 31 Fed. Rep. 904.

123. PATENTS—Effect of Foreign Patent.——The life of a patent is not abridged by the antedating of a foreign patent, when the application filed in the United States was prior in time.—*Emerson, etc. Co. v. Lippert*, U. S. C. C. (Penn.), Aug. 16, 1887; 31 Fed. Rep. 911.

124. PATENTS—Infringement—Restraining other Suits. ——Where, in a suit for infringement of patent, the defendant, before answering, files an intervening petition, alleging that he has a good defense, that he can pay all damages awarded, and that plaintiff threatens suit against purchasers from him, the court can restrain the plaintiff from bringing such suits, and should make such an order.—*Ide v. Ball Engine Co.*, U. S. C. C. (Ill.), Aug. 17, 1887; 31 Fed. Rep. 901.

125. PATENTS—Malt-kiln.——Patent of April 27, 1880, to Wenzel Toepfer for a malt-kiln, is not infringed by a device for tilting the sections of the floor of a malt-kiln by a round tilting-rod passing through the sections to be tilted.—*Toepfer v. Goetz*, U. S. C. C. (Ill.), July 5, 1887 31 Fed. Rep. 913.

126. PATENTS—Reissues—Assignment— Estoppel.—— A patentee sued for infringing a patent which he has assigned, is estopped from disputing the validity of its reissue.—*Burdsall v. Curran*, U. S. C. C. (Ill.), July 25, 1887; 31 Fed. Rep. 918.

127. PLEADING—Bail Bond—Allegation.——An allegation in a suit against the sureties on a bail bond that the accused was admitted to bail and did not appear at the trial, was held on demurrer not to be equivalent to an allegation, that the accused was released from custody in consideration of the undertaking of the sureties.—*People v. Solomon*, S. C. Utah, Sept. 2, 1887; 15 Pac. Rep. 4.

128. PLEADING—Joinder—Demurrer.—— A claim for work done by the plaintiff may be united with a similar claim by third parties, which has been assigned to the plaintiff. Misjoinder in one count is not ground of de-

murrer, in California.—*Frazer v. Oakdale, etc. Co.*, S. C. Cal., Aug. 15, 1887; 14 Pac. Rep. 829.

129. PLEADING—Statute of Frauds.——The statute of frauds must be raised by plea or answer, or by demurrer, when the facts stated in the bill justify it.—*Lewis v. Teal*, S. C. Ala., May 13, 1887; 2 South. Rep. 903.

130. PLEADING — Suretyship.——If, in a complaint, the plaintiff states relevant facts which will operate to defeat his cause of action, such complaint is bad on demurrer. The fact of suretyship must be judicially determined upon issues framed to present the question. Ruling as to accommodation indorses.—*Knopp v. Morell*, S. C. Ind., Sept. 27, 1887; 13 N. E. Rep. 51.

131. PRACTICE—Judicial Sale—Setting Aside.——A judicial sale taken *pro confesso* can only be set aside by suit in equity on the ground of an agreement for a reconveyance.—*Hausling v. Hausman*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 856.

132. PRINCIPAL AND AGENT—Contract—Adoption.——Where an agent has no authority to make a contract for the purchase of lands, the principal, after he finds the contract is advantageous to him, cannot adopt it and sue the vendor for non-performance.—*Athe v. Bartholemew*, S. C. Wis., June 1, 1887; 33 N. W. Rep. 110.

133. PUBLIC LANDS—Patents—Cancellation.——Where the State seeks to set aside a patent to public lands, and the good faith of the patentee is not questioned, she must offer to return the purchase money.—*People v. Bryan*, S. C. Cal., Sept. 14, 1887; 14 Pac. Rep. 803.

134. PUBLIC LANDS — Purchase — Execution — Patent.——Where A received a certificate of sale of public land on a partial payment, and on execution his interest is sold to B, B is entitled to a patent upon producing the sheriff's deed and paying the balance of the money. This law of 1872 prevails over the political code and its amendment of 1874.—*Cerf v. Reichert*, S. C. Cal., Sept. 12, 1887; 15 Pac. Rep. 10.

135. PUBLIC LANDS — Railroads — Timber.—— Under the act of 1875, railroads can take timber and other material necessary to contract and repair their road from public lands which can be conveniently reached by ordinary transportation by wagons, but not to take it and transport it to distant parts of their roads.—*U. S. v. Denver, etc. R. Co.*, U. S. D. C. (Colo.), Aug. 27, 1887; 31 Fed. Rep. 886.

136. PUBLIC LANDS—Railroads—Using Materials.——Under the act of 1875, certain railroads can use timber and material from adjacent public lands or authorize a contractor with them so to do, or if they buy the material from one taking it without authority neither party is liable as a wrong-doer. The land department has no authority to make any regulations on the subject.—*U. S. v. Chaplin*, U. S. C. C. (Oreg.), Aug. 29, 1887; 31 Fed. Rep. 890.

137. PUBLIC LANDS—Soldiers—Occupancy—Alienation.——Rev. Stat. U. S. § 2306, allowing an additional entry of land to discharged soldiers and sailors is independent of the other provisions, and one who has patented land thereunder may alien it without having entered on it.—*Rose v. Navada, etc. Co.*, S. C. Cal., Sept. 15, 1887; 15 Pac. Rep. 19.

138. QUIETING TITLE.——Where a party in possession of land files a bill to quiet title and makes such allegation as would, if established, entitle him to the relief he seeks and the defendant files a bill for the partition of land, but does not make the complainant in the first bill a party, the latter may enjoin the partition suit until his own suit shall have been decided.—*McCullough v. Absecome, etc. Co.*, N. J. Ct. Chan., Sept. 17, 1887; 10 Atl. Rep. 606.

139. RAILROAD—Negligence.——It is negligence for a railroad company to permit its trains to be run across a highway at a higher rate of speed than the law prescribes, for which negligence the company will be held liable if any damage ensues therefrom.—*Clark v. Boston, etc. Co.*, S. C. N. H. July 15, 1887; 10 Atl. Rep. 676.

140. RAILROAD—Negligence—Transfer to Trustees.——A railroad company cannot by a transfer of the possession and control of its road shift from itself to such trustees its liability for negligence of its officers and servants.—*Naglee v. Alexandria, etc. Co.*, S. C. App. Va., 1887; 3 S. E. Rep. 369.

141. RECEIVERS—Advice of Court.——Receivers on applications may have the advice of the court which, when the parties in interest are heard, may be decisive; otherwise, only binding on the receivers.—*Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, U. S. C. C. (La.), June 21, 1887; 31 Fed. Rep. 862.

142. RECORD—Abolution of Court—Appeal.——Where the appellant wishes to correct the record on appeal from the circuit court in Iowa, he must apply to the district court, to which those records have been transferred.—*De Wolf v. Taylor*, S. C. Iowa, June 11, 1887; 33 N. W. Rep. 154.

143. RECORDS — Swamp-Lands — Assessments—Alterations.——Entries in the minute books of the board of supervisors relative to swamp-land assessments are records, and an ex-clerk cannot amend them after his term of office, and parol evidence to correct or change the record is inadmissible.—*Swamp-land R. Dist. v. Wilcox*, S. C. Cal., Aug. 31, 1887; 14 Pac. Rep. 843.

144. REMOVAL OF CAUSES.——One who has, in the court of his own State, brought a suit against a citizen of another State, is not precluded from removing the cause to a federal court.—*Clews v. Muruford*, S. C. Ga., March 11, 1887; 3 S. E. Rep. 267.

145. REMOVAL OF CAUSES.——Where, after striking out the name of one of the complainants, it appears that all the remaining complainants are citizens of one State and all the defendants of another State, the State court cannot refuse on seasonable application removal of the cause to a federal court.—*Cuyler v. Smith*, S. C. Ga., June 14, 1887; 3 S. E. Rep. 408.

146. REPLEVIN—Demand.——In an action of replevin for the recovery of a chattel no demand is necessary if the defendant came in possession tortiously and with notice of plaintiff's claim of title, but a previous demand is necessary if he has acquired possession in good faith and in ignorance of plaintiff's interest.—*Burckhalter v. Mitchell*, S. C. S. Car., July 20, 1887; 3 S. E. Rep. 225.

147. SALE — Fertilizer — Guaranty—Statute.——Under a statutory guaranty of fertilizers, the purchaser is not entitled to give evidence of their failure to affect crops beneficially. The guaranty only extends to the constituents of the fertilizers as shown by chemical analysis.—*Hamlin v. Rogers*, S. C. Ga., March 9, 1887; 3 S. E. Rep. 259.

148. SALE—Title—Delivery.——A bill of sale of goods, signed by the purchaser, reciting the goods, and that the freight to certain point was to be paid by the seller, is not a written instrument purporting to contain all the terms of a contract, within the terms of the Georgia code, § 3803, and does not exclude parol proof of agreements as to where the title should pass.—*De Paus v. Caiser*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 254.

149. SCHOOL DISTRICTS — Annexation— Jurisdiction—Statute.——Ruling as to the jurisdiction of the superior court upon an application of a school district for annexation of adjacent territory, under the laws of Connecticut.—*Gravel Hill School District v. Old Farm School District*, S. C. Err. & App. Conn., September, 1887; 10 Atl. Rep. 689.

150. SHERIFF—Fees—Keeping Property.——The sheriff cannot claim the fee for keeping property attached, unless the court has, by order, allowed the claim in that suit.—*Shumway v. Leakey*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 841.

151. SOLDIER—Extra Pay—Statute.——One who enlisted as a soldier, but changed to the navy, is not entitled to extra pay provided by the statute of Vermont for union soldiers in the war of the rebellion.—*Brown v. State Treasurer*, S. C. Vt., Oct. 14, 1887; 10 Atl. Rep. 719.

152. STATUTES — Construction—Conflict.——The law that of conflicting sections of a chapter or article the latter shall prevail, does not apply when the sections

were passed at different times.—*People v. Dobbins*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 860.

153. STREETS — Dedication — Injunction — In Plats — Right of Way.——One who buys a lot with reference to a plat on which streets are designated, is entitled to a right of way on such streets as are pertinent to his lot. He who has an adequate remedy at law for inconvenience caused by obstruction of a street is not entitled to an injunction against such obstruction.—*Chapin v. Brown*, S. C. R. I., July 23, 1887; 10 Atl. Rep. 639.

154. SUBROGATION — Mortgage—Judgment.——A, the purchaser of land subject to a mortgage, which he assumed and paid, cannot be subrogated to the rights of the mortgagee as against a judgment existing when A purchased the land.—*Goodyear v. Goodyear*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 142.

155. TAXATION — Joint Purchase — Implication. —— From a joint purchase at a tax-sale a combination to prevent competition cannot be implied.—*Kerr v. Kipp*, S. C. Minn., May 16, 1887; 33 N. W. Rep. 116.

156. TAXATION — Tax-sale — Tax-certificates—Statutes. ——Construction of statute (Rev. Stat. Wis. § 1184) relating to taxation, tax-sales, tax-certificates, and the rights of assignees of such certificates.—*Reinhardt v. Oconto County*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 135.

157. TAXATION—Sale—Notice to Redeem.——An affidavit of notice of the time to redeem from a tax-sale, which adopts and refers to a printed notice with an affidavit showing its due publication, is sufficient.—*Johnson v. Brown*, S. C. Iowa, June 8, 1887; 33 N. W. Rep. 127.

158. TAXATION—Sale—Unorganized County.—— A sale for taxes by the treasurer of an unorganized county, which is attached to another, for revenue, is void.—*Hilliard v. Griffin*, S. C. Iowa, June 11, 1887; 33 N. W. Rep. 156.

159. TAXES—Levee—Payment.——Levee taxes in Sutler county may be paid with warrants drawn on the levee fund, or in gold or silver coin.—*Prescott v. McNamara*, S. C. Cal., Aug. 27, 1887; 14 Pac. Rep. 877.

160. TAX-SALE—Mode of Selling—Statute.——Under the statute law of Rhode Island, lands may be sold in one parcel, or in division of lots, at the reasonable discretion of the officer making the tax-sales. Ruling as to place of tax-sales.—*Howland v. Pettey*, S. C. R. I., Aug. 2, 1887; 10 Atl. Rep. 650.

161. TENANT IN COMMON—Account—Statute of Limitations.——A tenant in common is liable to his co-tenant in use of premises in excess of his share. If, upon accounting, the statute of limitations is pleaded and no replication filed, a general verdict sustains the plea as to all items prior to the bar of six years.—*Almy v. Daniels*, S. C. R. I., July 30, 1887; 10 Atl. Rep. 655.

162. TRADE-MARK — Injunction—Damage.——A combination of letters described which the court will protect as a trade-mark. A court of equity will not enjoin the use of a label similar to that of complainant unless it appears that he will suffer irreparable damage.—*Foster v. Blood, etc. Co.*, S. C. Ga., March 5, 1887; 3 S. E. Rep. 284.

163. TRUSTS—Powers — Special Receiver — Rents.—— Where real estate is subject to a trust, and the rents thereof are payable to a special receiver, to be paid by him directly to the *cestui que trust*, drafts drawn by the trustee in his own name or as trustee cannot be set-off by the lessee against a claim for rent.—*Witt v. Warwick*, S. C. App. Va., September, 1887; 3 S. E. Rep. 352.

164. VENDOR AND VENDEE—Equity—Injunction — Receiver.——When the title to land sold is the only security for the purchase money, a court of equity will not enjoin the transfer of notes for rents and profits pending an application for a receiver. If the purchaser, though insolvent, was so at the time of the purchase, and is not charged with waste or mismanagement, a court of equity will not appoint a receiver.—*Tumlin v. Vanhorne*, S. C. Ga., March 5, 1887; 3 S. E. Rep. 264.

165. VENDOR AND VENDEE—Specific Performance—Injunction—Equity Practice.——A city held lots in trust for common schools and sold them at auction, but claimed the right to cut off a strip to enlarge the street on which the lots abutted. Plaintiff purchased the lots, but refused to accept a deed for them diminished by the street addition: *Held*, that the remedy of the plaintiffs was not an injunction against a resale, but a bill for specific performance.—*City of Fort Smith v. Brogan*, S. C. Ark., July 2, 1887; 5 S. W. Rep. 337.

166. WASTE — Action — Tax-certificates — Pleading — Statutes.——Under the statutes of Wisconsin, a purchaser of land at tax-sale may maintain an action for waste committed during the period allowed for redemption by a trespasser or any other person. The waste for which such action may be brought is waste at common law. Rules as to pleading in such a case.—*Lander v. Hall*, S. C. Wis., Sept. 20, 1887; 34 N. W. Rep. 80.

167. WATER—Water-courses. —— The use of water for more than twenty years establishes a title by prescription.—*Taylor v. Blake*, S. C. N. H., July 15, 1887; 10 Atl. Rep. 698.

168. WILL—Bequests — Fund. —— Where a will bequeaths to a party a certain sum to be in notes, such as the executor may turn out, good notes must be delivered, and if there is a deficiency thereof the sum must be made up from other property of the estate.—*Frank v. Frank*, S. C. Iowa, June 11, 1887; 33 N. W. Rep. 153.

168. WILL—Construction—Legacy—Devise. —— Construction of a will by which a legacy to a minor vests in him, the income of such legacy up to the time of his majority, subject to charges enumerated in the will. A devise of lands to another person charged with payment of money legacies and expenses.—*Sanborn v. Clough*, S. C. N. H., July 15, 1887; 10 Atl. Rep. 678.

170. WILL—Construction—Descent—Heirs.——A will devising lands to two persons and the survivor of them for life, remainder to issue of one of them, in default of such issue to heirs of testator, will, in case of such default, vest the estate in the persons who were the heirs of testator at the time of his death.—*Stokes v. Van Wyck*, S. C. App. Va., Sept. 22, 1887; 3 S. E. Rep. 387.

171. WILL—Devise—Legacy.——A devise was made of a farm to J, and testator further provided that if J should move upon the farm, her trustee should give him such of the farm stock as he might select; otherwise the farm stock was to be part of the property put in charge of the trustee: *Held*, that J was entitled to the farm stock only on condition that he moved upon the farm.—*Robertson v. Mowell*, Md. Ct. App., Feb. 18, 1887; 10 Atl. Rep. 671.

172. WILL—Legacy—Vested Interest — Construction.— Where a testator gave his executors power to sell his plantation and invest the proceeds for the benefit of children and grandson, they to share equally in the profits, but not to encroach upon the principal: *Held*, that the will vested the title of such proceeds in fee simple in the children and grandson.—*Turner v. Kirkpatrick*, S. C. Ga., Jan. 18, 1887; 3 S. E. Rep. 246.

173. WILL—Devise—Survivorship — Per Capita.——A devise to nieces and nephews of myself and of my husband, carries an estate to those who survive the testatrix. They take *per capita*. A grandniece does not take, and one who is a niece to both does not take a double share.—*Campbell v. Clark*, S. C. N. H., July 15, 1887; 9 Atl. Rep. 702.

174.—WILL—Power—Construction.—— Where a will gives a party a monthly allowance, and directs the executors to increase it as they deem proper, and they are also named as guardians of the party, they can increase such allowance after their discharge as executors.—*Elmer v. Gray*, S. C. Cal., Aug. 30, 1887; 14 Pac. Rep. 862.

175. WILL—Widow—Election. —— Where a testator bequeaths all his property to his widow, she need not file a written election to take under the will in lieu of her statutory share.—*Bulfer v. Willigrod*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 136.

176. WILLS—Widow—Election.——Unless within six months after notice the widow elects to take under the

will, she cannot, under Iowa law, avail herself of the provisions of the will as to either personalty or real estate.—*In re Foster*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 135.

177. WITNESS —Administrator—Fraud.——In an action by heirs to set aside an administrator's deed, the administrator is a competent witness to prove fraud, and, on that ground, to discredit the deed, although the grantee is dead, unless his liability on her individual warranty in the deed is greater than his liability for misapplication of personality as administrator.—*Lassiter v. Simpson*, S. C. Ga., Feb. 20, 1887; 3 S. E. Rep. 243.

178. WITNESS — Deceased Persons—Partnership—Evidence.——A party to an action cannot testify as to transactions with a deceased person, partner of a firm party to such suit. Letters of a plaintiff to a third person may be read in evidence to show that he gave credit to an individual partner and not to the firm.—*Adams v. Eatherly, etc. Co.*, S. C. Ga., May 4, 1887; 3 S. E. Rep. 430.

179. WITNESS — Deceased—Widow—Competency.——An assignor of an account in a suit thereon by his assignee against the debtor's executors cannot testify as to his personal transactions with the deceased. A widow can testify for the plaintiff upon an account alleged to be due from the testator.—*Parcell v. McReynolds*, S. C. Iowa, June 9, 1887; 33 N. W. Rep. 139.

180. WRITS — Service —Acknowledgment.——In Alabama, where the sheriff, being a defendant, acknowledges service in writing and waives notice and copy of the summons and complaint, he waives any irregularity in the form of the summons.—*Ayers v. Hill*, S. C. Ala., June 30, 1887; 2 South. Rep. 892.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 25.

§ 3041, Rev. Stat. of Mo. allows to a defendant in a justice's court ten days after judgment to perfect his appeal, *provided* that if he be non-resident of the county where the suit is brought he has *twenty* days to appeal. § 3039, as construed by 79 Mo. 106, allows any defendant to appeal without the concurrence of a co-defendant. Suppose a judgment against two defendants, one resident, the other non-resident, they join in affidavit and bond for appeal filed *seventeen* days after judgment, is the appeal valid as to the non-resident defendant so as to entitle him to a new trial in the appellate court? X.

QUERIES ANSWERED.

QUERY NO. 22 [*25 Cent. L. J. 383.*]

B's store is burned and he assigns $300 in the policy to C. B employs D as his attorney. D gets judgment in circuit court against a mutual insurance company, but D says he cannot collect the money from individual stockholders unless the judgment is assigned to him. Would B be liable in criminal action if he assign judgment to D? A. G.

Answer. Without the assent of the insurance company it is generally held, that C obtains no interest in the policy by the assignment. 1 Wait's Act. & Def. 357; Freeman on Judg. § 424. If D is aware of C's claim, he holds the judgment subject to C's interest therein, and it has been held that he holds it any how subject to C's interest. Freeman on Judg. § 428. From the facts stated we presume that D is aware of C's interest, and the assignment is apparently in good faith for the benefit of all concerned, and that D merely represents B in the matter. In the absence of a special estate, we can perceive no criminal liability on B's part. H.

QUERY NO. 23 [*25 Cent. L. J. 408.*]

In 1879, J S died intestate and insolvent, seized of a farm of 160 acres, worth less than $2,500, on which he resided at the time of his death, leaving a widow to whom the land was assigned as a homestead, and adult children, his heirs. The intestate had incumbered the land by a mortgage for $1,000, in which the widow had joined, relinquishing her possibility of dower. This mortgage, after the death of the intestate, for a valuable consideration, was assigned to the widow. Can she have present satisfaction of the mortgage debt out of the reversion expectant upon determination of her homestead right without endangering her possession? L.

Answer. By her redemption she held the entire interest under the mortgage as assignee, till the reversioners paid their proportion of the mortgage. Norris v. Moulton, 34 N. H. 392. If they fail to pay their proportion, she can proceed to foreclose and obtain the absolute title. Tiedeman on Real Prop. §§ 66, *n.* 373. S.

QUERY NO. 24 [*25 Cent. L. J. 408.*]

A and B, deputy sheriffs from Mississippi, upon the authority alone of a bench warrant for the arrest of C, cross the Louisiana State line, and finding C, attempt his arrest. C resists and is killed. C is under indictment in Mississippi for murder, and has been a fugitive, of dangerous character, for years, and frequently, in evading arrest, crossed into the other State. A and B are now charged with his murder in Louisiana. The killing, if done in Mississippi, would have been justifiable. Query: Was it justifiable in Louisiana? If not, what is the grade of the offense? Cite authorities. J. B. S.

Answer. If there is reasonable ground of suspicion, an officer or a private person may arrest for felony without warrant. Whart. Crim. Prac. & Plead. §§ 8, 9, 13. In some States by statute, in others by comity, the arrest may be made in advance of a requisition. *Idem* § 29; Hurd on Hab. Corp. 614. We find no Louisiana decision on the subject. If the latter rule is adopted in Louisiana, A and B are not liable; otherwise they are guilty of murder, as acting unlawfully, unless their intent was only to inflict slight injury, when the offense may be reduced to manslaughter. 1 Whart. Crim. Law, §§ 314, 315. P.

Another Answer. The deputies, in crossing the State boundary and attempting to make the arrest, were transcending their powers, acting in excess of their jurisdiction, and officers so doing may be lawfully resisisted. They become the aggressors, and, if the person justifiably resisting is killed by them, they are to be treated as private individuals, and as such liable to prosecution and punishment for murder in the first degree. *Vide* 51 Barb. (N. Y.) 99; 1 East P. C. 313; R. & R. C. C. 53, and murder in the text-books, etc. E. D. P.

RECENT PUBLICATIONS.

COMMENTARIES ON THE LAW OF RECEIVERS, with Particular Reference to the Application of that Law to Railway Corporations, but Including in Detail a Complete Consideration of the whole Subject. By Charles Fisk Beach, Jr., of the New York Bar, Author of "The Law of Contributory Negligence" and Editor of "the Railway and Corporation Law Journal" New York: L. K. Strouse & Co., Law Publishers, No. 95 Nassau St. 1887.

This is a large volume of nearly eight hundred pages devoted to a branch of equity practice which, in a few years past has grown to enormous proportions and importance. It has not been many years since a receiver in chancery was an occasional officer of courts of equity, exercising very limited powers in strict subordination to the court by which he was appointed, and at whose pleasure or discretion he held his office. Now the receiver is emphatically a power in the land, combining in his single person all the functions of a great corporation, and practically all the power of a court of equity. How it happens that a subordinate officer of a court should be endowed with powers so unlimited, is now a matter familiar enough to most lawyers. A great railroad or other business corporation falls into financial embarrassment, nearly all of them do at some period of their career, foreclosure bills are filed and the result is a chancery suit of a longevity worthy of the days of Lord Eldon. Pending this suit it is essential to the interests of all concerned, including the general public, that the business of the company shall be carried on as usual, and a receiver is appointed in whom is vested all the powers of the moribund corporation, and for many years he carries on the business, "now and then," as an eminent jurist once said consulting the court, as a *quasi* partner." From this state of affairs affecting great corporations, immense masses of capital and a great diversity of interests, has grown up so much litigation that "Receiver Law," though one of the youngest, is now one of the most important branches of the science. Thousands of cases have been adjudicated and reported, and many text-books and commentaries have been written, of which the volume before us is the latest. Mr. Beach has evidently devoted much time and labor to this work, and has spared no pains in his efforts to make it complete and exhaustive. He has arranged his matter in the very best manner, and in full conformity as to divisions and subdivisions with the most approved modern standards, so that in that respect and in all others he has left very little to be desired. We think the work will be a very valuable addition to the rapidly accumulating mass of railway and corporation law, and is all the more acceptable because it is the latest work upon the subject.

THE DOCTRINE OF CY PRES as Applied to Charters. Being the Meredith Prize Essay of the University of Pennsylvania for the Year 1887. By Robert Hunter McGrath, Jr. "Knowledge Puffeth up, but Charity Edifieth.—1 Cor. viii: 1. Philadelphia: T. & J. W. Johnson & Co., 535 Chestnut Street. 1887.

This is a prize essay dovoted to a subject of more interest to the student than to the active practitioner, but nevertheless worthy of careful perusal even by veterans who would keep alive the legal reminiscences of their own youth. The doctrine of *cy pres* is of importance in England and a few of the American States but in most of them the law is settled that courts of equity have no power under this doctrine to divert legacies from the uses designated by a testator to others which, howsoever worthy, were never contemplated by him. The ground upon which this line of ruling is founded is that the power of the lord chancellor to vary the application of charitable bequests under the doctrine of *cy pres* is an exercise of royal prerogative, conferred by the sovereign upon the chancellor as a political officer and not as the head of a court of equity. We have always doubted the soundness of this view, as the construction of the will, emphatically a matter of equity jurisdiction, is a necessary prerequisite to an intelligent exercise of the powers conferred by the doctrine of *cy pres*.

The essay, presumably a first appearance, is in every respect creditable to the author and augurs well for his future success.

JETSAM AND FLOTSAM.

HE LOST IT.—A Detroit lawyer was talking with a manufacturer on Griswold street, near the city hall, yesterday, when he suddenly gave a start of surprise and said:

"Just excuse me for a moment, will you?"

"What is it?"

"Man has fallen down on the corner there."

"Ah—some friend of yours?"

"No, but I must see him. He may be an alien."

"And what of it?"

"Why, he'll probably want to sue the city for ten thousand dollars damages, and of course he'll want a lawyer. There, confound it!"

"He's got up."

"Yes, and I'm left. 'Nother lawyer got in ahead of me. I've lost no less than three first-class jobs just that way in the last two weeks."

DID NOT EXPECT TO BE TAKEN UP SO QUICK.—Judge Nehrbas, of the city court, treated Lawyer Nathan S. Levey to a disagreeable surprise yesterday. Mr. Levy was making a plaintive argument to the jury in behalf of Mrs. Francesca Mortiz, an interesting client who claimed she had been slandered by two of her fellow-employees in Statton & Storm's cigar factory—Agnes and Theodore Pach. All at once, in a burst of rhetorical effulgence, Mr. Levy exclaimed:

"It isn't money my client wants. It is the vindication of her character, more precious to her than rubies and diamonds. As far as money is concerned, she is willing to accept six cents damages—"

"If that is so, you need proceed no further, Mr. Levy," remarked Judge Nehrbas. "I will direct the jury to bring in a verdict for six cents damages. We will devote no further time to this case."

Mr. Levy was dumbfounded at this too liberal interpretation by the court of his statement. He gasped for breath, turned pale and subsided into a chair. Before he could recover, the verdict of six cents had been rendered and the next case called for trial. Mr. Levy passed the next hour in vainly endeavoring to make his enraged client understand that Judge Nehrbas' ruling was a joke, which would be rectified in a few days.